Supreme Court, U.S.
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NO. _____

In the Supreme Court of the United States

SOUTHERN NAZARENE UNIVERSITY, et al.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014), this Court held that the application of federal regulations implementing the Patient Protection and Affordable Care Act of 2010 ("ACA") to compel certain for-profit religious employers to provide health-insurance coverage for all FDA-approved contraceptives, *see* 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (the "Mandate"), violated the Religious Freedom Restoration Act ("RFRA"). The government offers nonprofit religious employers an alternative means of complying with the Mandate that involves submitting a form that includes all FDA-approved contraceptives in or under the auspices of employers' healthcare plans.

Petitioners, four religious universities, object as a matter of conscience to facilitating contraception that may prevent the implantation of a human embryo in the womb, and brought suit seeking relief from the Mandate under RFRA. The decision below rejected their claims, ruling that RFRA's substantial burden analysis turns on courts' secular assessment of the time, cost, and energy involved in complying with the Mandate, not Petitioners' religious view of the required action's moral significance.

The question presented is:

Whether the alternative means for nonprofit religious employers to comply with the ACA's contraceptive-coverage Mandate alters *Hobby Lobby's* substantial-burden analysis or identification of a free exercise violation under RFRA.

PARTIES TO THE PROCEEDING

Petitioners, who were Plaintiffs below, are Southern Nazarene University; Oklahoma Wesleyan University; Oklahoma Baptist University; and Mid-America Christian University.

Respondents, who were Defendants below, are Sylvia Burwell, in her official capacity as Secretary of the United States Department of Health and Human Services; the United States Department of Health and Human Services; Thomas E. Perez, in his official capacity as Secretary of the United States Department of Labor; the United States Department of Labor; Jacob J. Lew, in his official capacity as Secretary of the United States Department of the Treasury; and the United States Department of the Treasury.

CORPORATE DISCLOSURE STATEMENT

All Petitioners are nonprofit religious corporations. No Petitioner has a parent corporation. No publicly held corporation owns any portion of any of Petitioners.

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INTRODUCTION

Petitioners, four religious universities, object as a matter of conscience to facilitating four contraceptives that they believe can destroy human life. Regulations promulgated under the ACA, however, compel employers with more than fifty full-time employees to provide health-insurance coverage and compel most kinds of group insurance plans to cover FDA-approved contraceptives that may prevent the implantation of a fertilized egg. The government provides an alternative means of complying with the Mandate for religious nonprofits, but it involves executing and submitting a form that includes these objectionable contraceptives in or under the auspices of their health plans.

Although the government argues that executing and submitting the so-called "accommodation" form insulates religious nonprofits from the provision of abortifacient contraceptives, that is not the case. This permission slip directly involves Petitioners in providing objectionable contraceptives in multiple ways by, for example: (1) altering their health plans to allow for the provision of abortifacients, (2) requiring them to notify or identify for the government their insurers or third party administrators ("TPA") so that they can provide abortifacients on Petitioners' behalf, (3) officially authorizing their TPA as a plan and claims administrator solely for the purpose of providing abortifacients, and (4) requiring them to identify and contract with a TPA willing to provide the abortifacients to which they religiously object.

The form is thus far more than a notification of Petitioners' religious objection to abortifacient contraceptives; it legally and practically serves to bring the provision of those contraceptives about. Below, the court of appeals failed to appreciate this fact or the binding nature of this Court's substantial-burden analysis in *Hobby Lobby*. It consequently denied Petitioners' RFRA claim and those of a number of other religious nonprofit groups.

This case presents the "specific [religious] objection" to the government's accommodation scheme, "considered in detail by the courts" below, that *Hobby Lobby* lacked. *Id.* at 2786 (Kennedy, J, concurring). Both the enforceability of the ACA and the scope of RFRA are at stake. Religious nonprofits urgently need this Court's guidance, and this case is a clean vehicle for clarifying free exercise law. Further review by this Court is warranted.

DECISIONS BELOW

The panel opinion of the court of appeals is not yet reported but is available at No. 13-1540, 2015 WL 4232096 (10th Cir. July 14, 2015), and reprinted in Pet. App. at 1a-155a. The district court's opinion is not reported but is available at No. CIV-13-1015-F, 2013 WL 6804265 (W.D. Okla. Dec. 23, 2013), and reprinted in Pet. App. at 156a-184a.

JURISDICTION

The Tenth Circuit's judgment was entered on July 14, 2015. Pet. App. 185a-193a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND REGULATORY PROVISIONS

The Religious Freedom Restoration Act of 1993 provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb–1(a), unless "it demonstrates that the application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest," 42 U.S.C. § 2000bb–1(b).

"[T]he term 'exercise of religion' means religious exercise, as defined in section 2000cc–5 of this title." 42 U.S.C. § 2000bb–2(4). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc–5(7). "Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb–3(b).

The Patient Protection and Affordable Care Act of 2010 states, in relevant part, that "[a] group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... (4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services

Administration for purposes of this paragraph." 42 U.S.C. § 300gg–13(a)&(a)(4).

The following pertinent provisions are reproduced in the Petition Appendix ("Pet. App.") at 185a-237a: 42 U.S.C. §§ 2000bb-1, 2000bb-2, 2000cc-5, 300gg-13(a); 26 U.S.C. §§ 4980D, 4980H; 26 C.F.R. § 54.9815-2713AT; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A; 45 C.F.R. § 147.131.

STATEMENT OF THE CASE

I. Factual Background

Petitioners Southern Nazarene University ("SNU"), Oklahoma Wesleyan University ("OKWU"), Oklahoma Baptist University ("OBU"), and Mid-America Christian University ("MACU) (collectively, the "Universities") are religious institutions of higher learning. The Universities require anyone seeking entry into and participation in their communities to hold certain Christian beliefs, including respect for the dignity and worth of human life from the moment of conception. Pet. App. 168a. The Universities' mission includes promoting their members' spiritual maturity by fostering obedience to, and love for, their understanding of God's laws, including condemnation of the taking of innocent human life. Pet. App. 167a.

As a matter of religious conviction, the Universities believe that it is sinful and immoral for them to participate in, facilitate, enable, or otherwise support access to abortion-inducing drugs and devices, and related counseling. Pet. App. 158a. They hold that the Ten Commandments' rule "thou

shalt not murder" prevents Christians from facilitating or enabling the use of drugs or devices that are capable of preventing the implantation of a fertilized egg. Pet. App. 158a. The Universities believe that engaging in such sinful behavior has a detrimental impact on their fundamental relationships with God. Pet. App. 167a. The government does not contest the sincerity of their religious beliefs. Pet. App. 57 n.24 & 60a.

Here, the Universities' religious objection to the Mandate is limited to facilitating or enabling access to Plan B (the "morning after pill"), ella (the "week after pill"), certain IUDs, and related counseling—the same items objected to in *Hobby Lobby*. Pet. App. 158a; 134 S. Ct. at 2765-66. The Universities do not object to covering the other sixteen, FDA-approved methods of birth control. *See Hobby Lobby*, 134 S. Ct. at 2766. They simply object, on religious grounds to including in, or enabling in connection with, their health plans drugs or devices—either directly under the Mandate or through the government's alternative-compliance mechanism—that may stop the implantation of fertilized eggs and thus have an abortifacient effect. Pet. App. 158a; *see also Hobby Lobby*, 134 S. Ct. at 2762 (recognizing that four FDA-approved contraceptives may inhibit an egg's "attachment to the uterus").

The Universities believe that they have a religious duty to care for their members' physical well-being by providing generous health insurance benefits. Pet. App. 158a. SNU and MACU have self-insured employee plans. Pet. App. 36a. MACU provides insurance to its employees through the

ERISA-exempt GuideStone church plan. *Id.* OKWU and OBU have insured employee plans. *Id.* SNU and OBU also have insured student plans. *Id.* Consistent with their religious beliefs, all of the Universities' current healthcare plans exclude the four methods of FDA-approved contraceptives that may have an abortifacient effect. Pet. App. 159a, 160a, 161a.

The Mandate prohibits the Universities from continuing to provide health plans that comport with their religious beliefs. Instead, they are faced with four untenable options: (1) include abortifacient coverage in their health plans in compliance with the Mandate and violate their religious faith, (2) violate the Mandate and incur penalties of $100 per day for each affected individual, (3) discontinue all health plan coverage, violate their religious beliefs, and pay $2,000 per year per employee (after the first thirty), or (4) self-certify their religious objection to the Mandate, which then includes abortifacient coverage in or under the auspices of their health plans in violation of their beliefs. Pet. App. 166a-167a.

The spiritual cost of violating the Universities' religious beliefs and participating in the provision of drugs and items they reasonably believe to have an abortifacient effect is incalculable. But the ruinous financial penalties the Universities would incur by violating the Mandate are not. Annually, refusing to comply with the Mandate would subject the Universities to fines totaling over $30 million: $11,497,000 for SNU, $4,088,000 for OKWU, $9,818,500 for OBU, and $5,073,500 for MACU. Br. of the Appellees 3, 23-24, 10th Cir. Case, No. 14-

6026. Dropping health insurance altogether would not only violate the Universities' religious beliefs, drive up costs, and seriously compromise the Universities' competitiveness in the marketplace, but also result in collective annual fines totaling almost $1.5 million: $570,000 for SNU, $164,000 for OKWU, $478,000 for OBU, and $218,000 for MACU. *Id.*; *Hobby Lobby*, 134 S. Ct. at 2776-77.

II. Regulatory Background

In 2010, Congress passed the ACA. PUB. L. NO. 111–148, 124 Stat. 119 (2010). The ACA mandates that many health-insurance plans cover preventive care and screenings without requiring recipients to share the costs. 42 U.S.C. § 300gg–13(a)(4). Though Congress did not require contraceptive coverage in the ACA's text, the Department of Health and Human Services incorporated guidelines formulated by the private Institute of Medicine (IOM) into its preventive-care regulations. *See Hobby* Lobby, 134 S. Ct. at 2762. The IOM guidelines mandate that Petitioners include all FDA-approved contraceptives, sterilization procedures, and related counseling in their healthcare plan. *See id.*

The government's Mandate scheme makes enrollment in group health plans a prerequisite to the provision of objectionable contraceptives. Individuals have no right to contraceptive coverage under the Mandate absent group plan enrollment. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a] group health plan").

Employers that violate the Mandate face lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D; *Hobby Lobby*, 134 S. Ct. at 2762. These fines would quickly destroy the Universities' religious ministries and the hundreds of jobs that go with them, even though all members of the Universities' communities share their beliefs and opposition to the four forms of contraception in question. Pet. App. 168a.

The government completely exempts thousands of religious orders and churches and their integrated auxiliaries from the Mandate for exactly this reason, but it refuses to extend this "religious employer" exemption to Petitioners and other religious nonprofits. 78 Fed. Reg. 39,870, 39,874 (July 2, 2013); (opining that churches "are more likely than other employers to employ people of the same faith who share the same objection"). Religious entities that meet the government's narrow definition of a "religious employer" are not required to take any action to obtain an exemption from the Mandate. 45 C.F.R. § 147.131(a). Nor are these entities required to object to providing contraceptive coverage in connection with their healthcare plans. They simply exist outside of the Mandate's bounds.

The government exempts thousands of non-religious employers from the Mandate as well. Employers that hire fewer than fifty employees are not required to provide health insurance at all, and thus can avoid compliance with the Mandate that way. 26 U.S.C. § 4980H(c)(2)(A); 26 U.S.C. § 4980D(d). This is true despite the fact that such

small businesses employ approximately 34 million people. *Hobby Lobby*, 134 S. Ct. at 2764.

Employers with certain grandfathered healthcare plans that have only changed minimally since 2010 are also exempt from the Mandate. 42 U.S.C. § 18011; *see also Hobby Lobby*, 134 S. Ct. at 2763-64. Roughly 46 million people are enrolled in these healthcare plans. HHS, ASPE Data Point, *The Affordable Care Act is Improving Access to Preventive Services for Millions of Americans* 3 (May 14, 2015), *available at* http://aspe.hhs.gov/health/reports/2015/Prevention/ib_Prevention.pdf (last visited July 23, 2015). And "there is no legal requirement that grandfathered plans ever be phased out." *Hobby Lobby*, 134 S. Ct. at 2764 n.10.

Rather than exempting religious nonprofits from the Mandate as it did thousands of other religious and nonreligious organizations, the government created an alternative method of compliance with the Mandate. This so-called "accommodation" is merely a substitute form of compliance with the Mandate. *See* 45 C.F.R. § 147.131(c)(1) (noting that "an eligible organization ... complies with any requirement ... to provide contraceptive coverage if [it] furnishes a copy of the self-certification" to its insurance issuer); 78 Fed. Reg. 39,870, 39,879 (July 2, 2013) (explaining that "an eligible organization" that fulfills the alternative method of compliance "is considered to comply with section 2713 of the PHS Act"). Importantly, the government does not exempt religious nonprofits from the Mandate's scope as it does churches, their integrated auxiliaries, and even many for-profit employers.

If a religious organization with an insured or self-insured group health plan (1) has religious objections to providing some or all contraceptives required by the Mandate, (2) is organized and operates as a nonprofit entity, (3) holds itself out as a religious organization, and (4) self-certifies that it meets the first three criteria, it is eligible for this alternate means of compliance. *Id.* at 39,874-80. The self-certification requirement can be accomplished in two ways but both methods have the same result. *See* Dep't of Labor, EBSA Form 700, *available at* http://www.dol.gov/ebsa/healthreform/regulations/coverageofpreventiveservices.html (last visited July 23, 2015) (recognizing that the "form or a notice to the Secretary [becomes] an instrument under which the plan is operated").

First, a religious nonprofit may complete the Employee Benefits Security Administration's Form 700 ("EBSA Form 700" or the "Form") and provide the Form to its health insurance issuer, for insured plans, or TPA, for self-insured plans. *Id.* The Form clarifies that TPAs then bear a new burden to provide contraceptive coverage without cost sharing to religious nonprofits' plan beneficiaries if they voluntarily decide to continue administrating services for religious nonprofits' self-insured healthcare plans. *Id.*; *see also* 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A.

Second, a religious nonprofit may mail or email the U.S. Department of Health and Human Services ("HHS") a notice that it objects to providing some or all contraceptive services required by the Mandate

(the "Notice"). 79 Fed. Reg. 51,092, 51,094-95 (Aug. 27, 2014). This notice must contain (a) the name of the organization and the basis on which it qualifies for an accommodation, (b) a description of its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptives, (c) the name and type of group health plan it possesses, and (d) the name and contact information for its health insurance issuers or TPAs. *Id.* at 51,094-95. HHS then sends a notification to the religious nonprofits' insurers and/or TPAs on their behalf informing the insurers and/or TPAs of their new "obligations" to provide contraceptive coverage to plan participants. *Id.* at 51,095; 29 C.F.R. § 2510.3-16(b).

Both alternative methods of compliance with the Mandate have significant legal and practical effects. Legally speaking, they alter a nonprofit religious organization's health plan and become "an instrument under which that plan is operated." EBSA Form 700. For self-insured plans, submitting either the Form or Notice serves as a special designation of a religious nonprofits' TPA as "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b)&(c). This written delegation is essential to "ensure[] that there is a party with legal authority" under ERISA to pay for contraceptive services under religious nonprofits' self-funded health care plans. 78 Fed. Reg. at 39,880; *see also* 29 U.S.C. § 1102(a)(1) (requiring, that self-funded health plans be modified in writing).

Practically speaking, religious nonprofits with self-insured plans normally pay their own claims. Only by virtue of a religious nonprofit's submission of the Form or Notice does a TPA become obligated and possess the authority to pay for abortifacient contraceptives that violate the organization's religious beliefs. 45 C.F.R. § 156.50(d)(1)-(3). Furthermore, the government incentivizes TPAs to continue servicing nonprofit religious organizations' health plans by reimbursing them at a rate of 115% of their costs. *Id.*

But if a religious nonprofit's existing TPA is unwilling to provide contraceptives to plan participants on their behalf, the TPA may decline to service their self-insured plans. 26 C.F.R. § 54.9815-2713A; 29 C.F.R. § 2510.3-16; 29 C.F.R. § 2590.715-2713A. In this situation, government regulations force a religious nonprofit to seek out a TPA that is willing to provide the very abortifacient contraceptives that violate its faith. *See* 78 Fed. Reg. at 39,880 (imposing no obligation on TPAs "to enter into or remain in a contract with" an objecting religious organization); 26 C.F.R. § 54.9815-2713AT(b)(1)(i) (requiring that a self-insured organization "contract[] with one or more third party administrators" to qualify for the alternative mechanism for complying with the Mandate).

The practical ramifications of executing and submitting the Form or Notice are equally significant in regard to insured plans. Under this Court's holding in *Hobby Lobby*, the government may not apply the Mandate to force closely-held for-profit religious employers or nonprofit religious

employers to cover religiously-objectionable contraceptives in their health plans. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful"). The government's only means of Mandate enforcement against religious nonprofits is thus via the alternative methods of compliance outlined above. Absent the government's imposition of a Form or Notice requirement to ensure Mandate compliance, religious nonprofits would be as free as churches (and many secular employers) to offer health plans that comply with their religious beliefs and do not facilitate the provision of contraceptives with abortifacient effects.

III. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Western District of Oklahoma, challenging the application of the Mandate under RFRA and seeking preliminary injunctive relief. They moved for a preliminary injunction before their health plans were set to renew in 2014. Pet. App. 159a, 160a, 161a.

The district court granted Petitioners' request for a preliminary injunction and enjoined and restrained Respondents "from any effort to apply or enforce, as to [Petitioners], the substantive requirements imposed by 42 U.S.C. § 300gg-13(a)(4) ... or the self-certification regulations related thereto, or any penalties, fines or assessments related thereto, until the further order of the court." Pet. App. 184a. It reasoned, like this Court in *Hobby Lobby*, that "[i]f the [religious] belief is sincere and

the pressure to violate that belief is substantial, the substantial burden test is satisfied." Pet. App. 176a.

Accordingly, the district court held that the Mandate imposed a substantial burden on Petitioners' free exercise of religion because the self-certification "is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." Pet. App. 177a. It identified an impermissible "Hobson's Choice" under the regulatory scheme because, on one hand, "[i]f the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences." *Id.* On the other hand, "[i]f the institution does sign the permission slip, and only if the institution signs the permission slip, [the] institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary." *Id.*

The district court squarely rejected the government's "belittling" argument that self-certification is simply "signing a piece of paper" as such logic is "belied by too many tragic historical episodes" to deserve credence. Pet. App. 177a. It explained that the substantial burden analysis under *Hobby Lobby* focuses "on the pressure exerted [on religious belief], not on the onerousness of the physical act that might result from yielding to that pressure." Pet. App. 176a. After all, "RFRA undeniably focuses on violation of conscience, not on physical acts." Pet. App. 177a. Because Petitioners faced "a choice of either acquiescing in a

government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action," the district court determined not only that the application of the Mandate burdened their religious beliefs, but also that this "burden [was] substantial." Pet. App. 178a.

Respondents appealed. The court of appeals subsequently consolidated the Universities' case with two other challenges to the Mandate filed by nonprofit religious groups.[1] A divided panel of the court of appeals then reversed the district court's grant of a preliminary injunction to the Universities. Pet. App. 121a-122a. The panel majority held that the alternative mechanism of compliance with the Mandate for religious nonprofits does not impose a substantial burden on Petitioners' insured or self-insured health plans.

Rather than asking whether the Mandate imposed substantial pressure on Petitioners not to follow their religious beliefs, which the government conceded are sincere, the panel majority inquired "how the law or policy being challenged actually operates and affects religious exercise." Pet. App. 57a. But the panel majority largely sidestepped

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[1] The court of appeals consolidated the Universities' case with that of Little Sisters of the Poor, Little Sisters of the Poor Home for the Aged, Christian Brothers Services, and Christian Brothers Employee Benefit Trust, as well as that of Reaching Souls International, Inc., Truett-McConnell College, Inc., and GuideStone Financial Resources of the Southern Baptist Convention. None of these additional organizations are parties to this petition for writ of certiorari.

considering how the alternative means of complying with the Mandate operates in practice and instead focused on the supposed "purpose of religious accommodation." Pet. App. 77a.

According to the panel majority, the purpose of religious accommodation is not to provide exemptions that relieve burdens on objectors' sincerely held beliefs but "to permit the religious objector both to avoid a religious burden and to comply with the law." Pet. App. 77a. The panel majority consequently held that if Petitioners "wish to avail themselves of ... an accommodation ... to be excused from compliance with [the Mandate], they cannot rely on the possibility of their violating [the Mandate] to challenge the accommodation." *Id.*

The panel majority thus insulated the alternative mechanism for complying with the Mandate from RFRA scrutiny by holding that the very "point of an accommodation" is "shifting a responsibility from an objector to a non-objector." Pet. App. 78a. Regardless of Petitioners' central role in causing not only that legal shift, but also the real-world provision of objectionable contraceptives, which even the panel majority acknowledged in the self-insured contexts amounts to but-for causation, Pet. App. 69a, the court declined to consider Petitioners' RFRA claim. It held instead that Petitioners "fail[e]d to establish any burden on [their] religious exercise," Pet. App. 66a, because it viewed the provision of objectionable contraceptives—in some overarching sense—as not attributable to any private actor but to "the framework established by federal law," Pet. App.

73a. *See also* Pet. App. 81a ("Opting out does not cause the coverage itself; federal law does ....").

The panel majority also dismissed any consideration of Petitioners' sincere religious beliefs and the substantial fines the Mandate imposes for sticking by them because it considered the Universities to have "misstate[d] their role in the accommodation scheme." Pet. App. 90a. It held that "RFRA does not require us to defer to [Petitioners'] erroneous view about the operation of the ACA and its implementing regulations." *Id.* The correct view, according to the panel majority, is that "[h]aving to file paperwork or otherwise register a religious objection ... does not alone substantially burden religious exercise." Pet. App. 92a.

Petitioners' religious view of "the moral significance of their involvement" with this paperwork was irrelevant to the panel majority. Pet. App. 98a. It concluded that only secular costs matter for purposes of RFRA's substantial burden analysis, such as "the time, cost, or energy required to comply" with the alternative mechanism for Mandate compliance. Pet. App. 97a-98a. Because the estimated cost of preparing and providing the Form or Notice amounted to "'approximately 50 minutes for each eligible organization with an equivalent cost burden of approximately $53.00,'" the panel majority concluded that no substantial burden exists. Pet. App. 98a n.49 (quoting 79 Fed. Reg. at 51,097).

Judge Baldock dissented in part. He recognized that "[s]everal learned judges have argued

compellingly that, under ... *Hobby Lobby* ..., the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is 'substantial' under RFRA." Pet. App. 128a. But, in order to show "an even deeper problem lurking within the self-insured accommodation scheme," he assumed that a burden on religious exercise is not substantial unless Petitioners could show "how their compelled act causes that coverage." Pet. App. 130a.

Because "the self-insured accommodation renders any duty to provide, and any entitled to receive, contraceptive coverage wholly unenforceable and thus illusory—unless and until the self-insured plaintiffs opt out," Judge Baldock concluded that the self-insured plaintiffs had established but-for causation. Pet. App. 135a. He recognized that "*Hobby Lobby* forbids the government placing [the Mandate directly] on the nonprofits themselves. So if opting out is necessarily a but-for cause of someone else providing the coverage, it is necessarily a but-for cause of providing the coverage *at all*." Pet. App. 136a. And he questioned how the panel majority could "concede[] but-for cause and then turn[] around and den[y] the existence of any causation." Pet. App. 137a.

Judge Baldock thus concluded that, even applying the majority's standard, "the accommodation foists upon the self-insured plaintiffs a Hobson's choice and thus a substantial burden on their exercise of religion." Pet. App. 139a. In his

view, this Court's orders in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S. Ct. 1022 (2014), *Wheaton College v. Burwell*, 134 S. Ct. 2806 (2014), and *Zubik v. Burwell*, No. 14A1065, __ S. Ct. __, 2015 WL 3947586 (June 29, 2015), which "do not require religious non-profits to identify related third parties for the government" establish a "less-restrictive means of facilitating access to contraception." Pet. App. 148a. Hence, Judge Baldock concluded that "the current accommodation scheme" for self-insured religious nonprofits was "doom[ed] ... under strict scrutiny." Pet. App. 149a n.64.

REASONS FOR GRANTING THE WRIT

This Court demonstrated significant regard for the crisis of conscience religious nonprofits face in light of the Mandate in *Little Sisters*, *Wheaton College*, and *Zubik*. The courts of appeals, including the Tenth Circuit below, have failed to do likewise. Instead, they have disregarded the Court's teachings in *Hobby Lobby* concerning RFRA's substantial-burden analysis and substituted their own moral judgments regarding the Mandate's significance for those of sincere religious objectors. This Court's intervention is needed to restore the balance and ensure that RFRA provides the "very broad protection for religious liberty" that Congress intended. *Hobby Lobby*, 134 S. Ct. at 2760.

I. Whether the Mandate's Application to Religious Nonprofits Violates RFRA is a Question of Exceptional Importance.

Petitioners and hundreds of religious nonprofits like them claim the right to provide health insurance to their employees without including or facilitating the provision of contraceptives to which they religiously object. This is similar to the question this Court granted review to decide in *Hobby Lobby*, which asked whether the government could "demand that three closely held corporations provide health-insurance coverage for methods of contraception that violate the sincerely held religious beliefs of the companies' owners." 134 S. Ct. at 2759. This Court held "that the HHS mandate is unlawful" as applied to those for-profit entities. *Id.* Whether RFRA grants religious nonprofits this right is an "important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c); *see Hobby Lobby*, 134 S. Ct. at 2782 (reserving the question of whether the government's alternative compliance mechanism for nonprofits "complies with RFRA for purposes of all religious claims").

Religious nonprofits' moral crisis results from the government's decision not to exempt them from the Mandate. Instead, the government exempted only a small subset of religious employers that consists of religious orders, churches, and their integrated auxiliaries. 78 Fed. Reg. at 39,874; 26 C.F.R. § 1.6033-2(h). The government's rationale for providing this narrow exemption is that churches and like organizations "that object[] to contraceptive coverage on religious grounds are more likely than

other [religious] employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan." 78 Fed. Reg. at 39,874.

This unsubstantiated assertion fails to account for religious universities, like Petitioners, whose community members subscribe to the same beliefs and thus share the same religious objections. As a result, some religious nonprofit employers (*e.g.*, integrated auxiliaries of churches, some of which are educational institutions) are completely exempt from the Mandate, whereas other similarly-situated religious nonprofit employers are not (*e.g.*, religious universities). *See Hobby Lobby*, 134 S. Ct. at 2777 n.33 (recognizing that "churches[] that have the very same religious objections" as Petitioners are exempt from the Mandate); *id.* at 2786 (Kennedy, J., concurring) ("RFRA is inconsistent with ... an agency such as HHS ... distinguishing between different religious believers ... when it may treat both equally"); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (prohibiting "favoritism among sects"); *Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (recognizing the dangers of "preferring some religious groups over" others).

Most religious employers accordingly faced a crisis of conscience after the Mandate took effect and their health plans were set to renew. The Mandate precludes religious employers like Petitioners from keeping their existing health plans, which comply with their religious beliefs and do not include or facilitate the provision of objectionable

contraceptives. What remains are four untenable options: (1) comply with the Mandate directly by offering health plans that include abortifacients, (2) comply with the Mandate through the alternative compliance mechanism, which includes abortifacients in or under the auspices of religious nonprofits' health plans, (3) refuse to comply with the Mandate and offer health plans that exclude abortifacients and incur $100-per-employer-per-day fines, or (4) drop health coverage altogether and incur annual fines of $2,000 per employee (after the first thirty).

The first and second options equally violate Petitioners' religious beliefs because the Mandate makes it impossible for them to provide health care and avoid providing abortifacient contraceptives in or under the auspices of their health plans. Pet. App. 167a; *cf. Hobby Lobby*, 134 S. Ct. at 2759 ("If the owners comply with the HHS mandate, they believe they will be facilitating abortions ...."). As the district court recognized, the self-certification "is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." Pet. App. 177a. Religious nonprofits with sincere religious objections to facilitating abortifacient contraceptives, like Petitioners, cannot sign that permission slip and comply with their faith.

By requiring religious nonprofits to sign the self-certification anyway, the government exerts substantial pressure on Petitioners to forego three

singular forms of religious exercise: (a) the religious duty to live out their belief in the dignity of human life by providing health insurance to their members, (b) the religious duty to advance their members' spiritual maturity by fostering obedience to God's commands, including the ban on taking innocent human life, and (c) the religious duty to avoid materially cooperating with sinful behavior or immoral conduct. Pet. App. 158a. 167a-168a.

Although the third option is not religiously objectionable, the Mandate renders it financially impossible. Religious employers that are subject to the Mandate incur $100 per-employee-per-day fines for refusing to provide abortifacient contraceptives. This penalty would result in Petitioners incurring annual collective fines totaling more than $30 million, a ruinous sum that would quickly force the Universities to shut their doors. Br. of the Appellees 3, 23, 10th Cir. Case, No. 14-6026; *cf. Hobby Lobby*, 134 S. Ct. at 2775-76 (recognizing that fines for violating the Mandate ranging from $15 to $475 million per year "are surely substantial").

The fourth option is both religiously objectionable and financially implausible. It would deny Petitioners the ability to fulfill their religious obligation to live out their beliefs concerning the value of human life by providing health care to their members. Pet. App. 158a; *cf. Hobby Lobby*, 134 S. Ct. at 2776 ("[T]he Hahns and Greens and their companies have religious reasons for providing health-insurance coverage for their employees."). Moreover, it would subject Petitioners to collective fines totaling almost $1.5 million annually, Br. of the

Appellees 3, 24, 10th Cir. Case, No. 14-6026, and put them at "a competitive disadvantage" in the marketplace by forcing employees to obtain their own health insurance, which is generally more expensive than participating in a group health plan, *Hobby Lobby*, 134 S. Ct. at 2777. It would also lead to an increase in employees' salaries designed to defray the costs of individual health plans, but any such payment would have to account for employees' increased exposure to personal income tax. *Id.*

Whether RFRA allows the government to force religious nonprofits, like Petitioners, to choose one of these untenable options is a question of exceptional importance. Our nation was founded on freedom of religion and Congress mandated that RFRA "'be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the [statute's terms] and the Constitution.'" *Id.* at 2762 (quoting 42 U.S.C. § 2000cc-3(g)). This Court should decide whether religious nonprofits' claim to freedom to offer health insurance in accordance with their faith exceeds these expansive bounds.

The question is particularly important in the context of the ACA, one of the most sweeping and intrusive federal laws ever enacted. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2649 (2012) (joint dissent) (noting the threat the individual mandate posed to "our constitutional order" by subjecting "*all* private conduct (including failure to act) ... to federal control"). As this Court recognized in *Hobby Lobby*, the Mandate raises important concerns over the power of the ACA to trump even the most fundamental of rights. It

would be incongruous for this Court to consider the religious freedom of for-profit corporations like Hobby Lobby and Conestoga Wood but leave religious nonprofit corporations like Petitioners without recourse.

Critically, the Mandate is already in effect, imposing fines and lawsuits on plans that offer employee coverage but omit required items. 26 U.S.C. § 4980D ($100/plan participant/day fines); 29 U.S.C. § 1132 (government lawsuits). More than a hundred religious nonprofits have filed over fifty cases seeking relief from the religious coercion that flows from the Mandate.[2] Religious nonprofits urgently need the Court to settle this Term whether RFRA exempts them from the Mandate or whether they are legally prohibited from "striving for a self-definition shaped by their religious precepts." *Hobby Lobby*, 134 S. Ct. at 2785 (Kennedy, J., concurring).

II. The Court of Appeals' Substantial-Burden Analysis Conflicts with *Hobby Lobby*.

This Court's review is also warranted because the court of appeals conducted its substantial-burden analysis under RFRA in a manner "that [squarely] conflicts with" *Hobby Lobby*. SUP. CT. R. 10(c). In that case, this Court considered "whether the challenged HHS regulations substantially burden[ed] the exercise of religion" and held "that they do." *Hobby Lobby*, 134 S. Ct. at 2759. Religious objectors in *Hobby Lobby* sincerely believed that "[i]f

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[2] *See* Becket Fund for Religious Liberty, *HHS Mandate Information Central*, *available at* http://www.becketfund.org/hhsinformationcentral/ (last visited July 23, 2015).

[they] compl[ied] with the HHS mandate, ... they [would] be facilitating abortions, and if they [did] not comply, they [would] pay a very heavy price" in the form of ruinous fines. *Id.* This Court reasoned that "[i]f these consequences do not amount to a substantial burden, it is hard to see what would." *Id.*

No daylight exists between *Hobby Lobby* and the present case.[3] Petitioners, like the religious objectors in *Hobby Lobby*, believe that by complying with the Mandate either directly or through the alternative mechanism for compliance they would be facilitating abortions. Pet. App. 167a; *cf. Hobby Lobby*, 134 S. Ct. at 2775 ("[T]he HHS mandate demands that [religious objectors] engage in conduct that seriously violates their religious beliefs."). The sincerity of those religious beliefs is uncontested. Pet. App. 57 n.24 & 60a; *cf. Hobby Lobby*, 134 S. Ct. at 2779 (noting "HHS [did] not question [the religious objectors'] sincerity"). If Petitioners refuse to comply with the Mandate, they will incur the same ruinous annual fines, ranging from $4,088,000 for OWU to $11,497,000 for SNU. Br. of the Appellees 3, 23, 10th Cir. Case, No. 14-6026; *cf. Hobby Lobby*, 134 S. Ct. at 2775-76 (noting the

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[3] Notably, this Court has twice granted review, vacated judgments against religious nonprofits challenging the Mandate, and remanded these cases to lower courts for reconsideration in light of *Hobby Lobby* because there was a "reasonable probability" that those decisions rest on "a premise" that should now be "reject[ed]." *Lawrence ex rel. Lawrence v. Charter*, 516 U.S. 163, 167 (1996); *see Univ. of Notre Dame v. Burwell*, 135 S. Ct. 1528 (2015); *Mich. Catholic Conference v. Burwell*, 135 S. Ct. 1914 (2015).

religious objectors faced $15 to $475 million in annual fines).

As in *Hobby Lobby*, by requiring Petitioners to comply with the Mandate, "HHS ... demands that they engage in conduct that seriously violates their religious beliefs." *Id.* at 2775. This Court's holding that RFRA's substantial-burden standard is readily satisfied under these circumstances thus applies in full force. *Id.* at 2759. The court of appeals evaded this straightforward conclusion by accepting arguments that are indistinguishable from those *Hobby Lobby* rejected.

The government in *Hobby Lobby* sought to preclude relief from the Mandate under RFRA by arguing that "the connection between what the objecting parties must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated." *Id.* at 2777. But this Court recognized that such an "argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with *their religious beliefs*) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable)." *Id.* at 2778.

The court of appeals adopted this attenuation argument below under the guise of determining "how the law or policy being challenged actually operates

and affects religious exercise," Pet. App. 57a, and thus answered the wrong question under RFRA. Pinning the consequences of the Mandate on "federal law" and dismissing Petitioners' religious understanding of "their role" in the Mandate scheme, Pet. App. 73a, 90a, is simply shorthand for the government's argument in *Hobby Lobby* that facilitating the provision of objectionable contraceptive "coverage would not itself result in the destruction of an embryo." 134 S. Ct. at 2777. But this Court made clear in *Hobby Lobby* that RFRA's substantial-burden standard is not a but-for causation test. *See id.* at 2779 ("[T]he Hahns and Greens and their companies sincerely believe that providing the insurance coverage demanded by the HHS regulations lies on the forbidden side of the line, and it is not for us to say that their religious beliefs are mistaken or insubstantial.").

Petitioners, like the religious objectors in *Hobby Lobby*, believe that complying with the Mandate "is connected to the destruction of an embryo in a way that is sufficient to make it immoral for them to provide [health] coverage." *Id.* at 2778. Answering this "difficult and important question of religion and moral philosophy" with one "binding national answer" and telling Petitioners "that their [religious] beliefs are flawed," as this Court explained in *Hobby Lobby*, is not a job for HHS or the courts. *Id.* The only relevant question under RFRA is whether Petitioners' asserted religious beliefs "reflect 'an honest conviction' and there is no dispute that it does." *Id.* at 2779 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). Under *Hobby Lobby*, "[b]ecause the contraceptive

mandate forces [Petitioners] to pay an enormous sum of money ... if they insist on providing insurance coverage in accordance with their religious beliefs, the mandate clearly imposes a substantial burden on those beliefs." *Id.*

Though RFRA does not require that religious objectors draw a moral line that is "'[]reasonable,'" *id.* at 2778 (quoting *Thomas*, 450 U.S. at 715), Petitioners' religious objections surely are. The government's Mandate scheme makes enrollment in their health plans a prerequisite to the provision of objectionable contraceptives. Members have no right to contraceptive coverage absent plan enrollment. *See* 29 C.F.R. § 2590.715-2713A(d) (explaining that contraceptives are available only "so long as [beneficiaries] are enrolled in [a religious nonprofits'] group health plan"). Absent an exemption from the Mandate, Petitioners' decision to provide group health insurance thus causes an entitlement to abortifacient contraceptives that violate their faith.

In addition, fulfilling the alternate form of compliance with the Mandate by submitting the Form or Notice makes either document "an instrument under which [a health plan] is operated" and thus changes Petitioners' health plans. EBSA Form 700. For religious nonprofits like SNU and MACU that have self-insured employee plans, the Form or Notice officially designates their TPA as a special "plan administrator and claims administrator solely for the purpose of providing payments for contraceptive services for participants and beneficiaries." 78 Fed. Reg. at 39,879; 29 C.F.R. § 2510.3-16(b)&(c). If SNU and MACU refuse to

submit the Form or Notice, no party has "legal authority" to pay for objectionable contraceptive on their behalf. 78 Fed. Reg. at 39,880. SNU's and MACU's execution and submission of the Form or Notice thus fundamentally changes their health plans and directly causes the provision of abortifacient contraceptives to their employees. It is not difficult to see why forcing SNU and MACU to authorize an agent to provide abortifacients on their behalf would seriously violate their religious beliefs, particularly when even the government agrees that these abortifacients would be otherwise unavailable.

Religious nonprofits with self-insured health plans also normally pay their own claims. Only executing and signing the Form or Notice gives SNU's and MACU's TPAs authority to pay for drugs and items (*i.e.*, religiously objectionable forms of abortifacient contraceptives) on their behalf. 45 C.F.R. § 156.50(d)(1)-(3). The Form or Notice thus requires SNU and MACU to alter their contracts with their TPAs and fundamentally change the nature of these relationships to provide the abortifacients to which they religiously object. Rather than simply giving notice of SNU's and MACU's religious beliefs, the Form or Notice works contractual changes that authorize the TPAs to violate them on SNU's and MACU's behalf.

Moreover, if SNU's and MACU's TPAs ever prove unwilling to provide abortifacient contraceptives on their behalf, the government's regulations require SNU and MACU to hire TPAs that will. 78 Fed. Reg. at 39,880; 26 C.F.R. § 54.9815-2713AT(b)(1)(i). In these circumstances,

forcing SNU and MACU to seek out third parties to engage in what they regard as sinful behavior on their behalf is obviously a severe burden on their exercise of religious faith. And it renders SNU and MACU complicit in the provision of abortifacient contraceptives in the clearest sense.

Executing and submitting the Form or Notice is not less significant for religious nonprofits like OKWU and OBU that have insured employee plans. Under this Court's holding in *Hobby Lobby*, RFRA precludes the government from applying the Mandate directly to religious nonprofit employers. *See* 134 S. Ct. at 2785 ("[U]nder the standard that RFRA prescribes, the HHS contraceptive mandate is unlawful."). The government's only functional means of providing abortifacient contraceptives to OKWU's and OBU's employees is thus compelling them to submit the Form to their insurance issuers or the Notice to HHS. Either action requires OKWU and OBU to facilitate the provision of otherwise unavailable abortifacients to its employees by identifying related third parties for the government.

In this way, the Form or Notice functions as "a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from [OKWU's and OBU's] insurer ..., to the products to which [they] object." Pet. App. 177a. Requiring OKWU and OBU to facilitate the provision of abortifacient contraceptives to their employees in this manner understandably burdens their religious beliefs. They are, after all, religious nonprofits who absent the Mandate would be free to scrupulously follow the

moral convictions on which they were founded. And this Court has made clear that even an "indirect consequence" of a law can amount to a "substantial burden" on objectors' free exercise of religion. *Thomas*, 450 U.S. at 717.

The Tenth Circuit was thus wrong to hold that the Mandate does not substantially burden Petitioners' free exercise of religion. As a number of esteemed court of appeals judges have recognized, *Hobby Lobby* compels the opposite conclusion. *See Priests for Life v. U.S. Dep't of Health & Human Servs.*, No. 13-5368, slip op. at 17-22 (D.C. Cir. May 20, 2015) (Brown, J., dissenting from denial of rehearing en banc, joined by Henderson, J.); *id.* at 35 (Kavanaugh, J., dissenting from denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir. 2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir. 2014) (Pryor, J. specially concurring). This Court's review is needed to realign the courts of appeals with *Hobby Lobby* and restore the "very broad protection for religious liberty" that Congress intended in enacting RFRA.[4] 134 S. Ct. at 2767.

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[4] Recognizing that the Mandate substantially burdens Petitioners' free exercise of religion would plainly invalidate its application to them under RFRA. "The least-restrictive-means standard is exceptionally demanding." *Hobby Lobby*, 134 S. Ct. at 2781, and the government has "many ways to increase access to free contraception without doing damage to the religious liberty rights of conscientious objectors." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). Perhaps "[t]he most straightforward way of doing this would be for the [g]overnment to assume the cost of providing the four

III. This Case is a Clean Vehicle.

This case presents an ideal vehicle for resolving the question presented. The relevant facts have never been disputed by either side, and no judge below suggested any deficiencies in the record. All the elements of a RFRA claim were briefed and argued below. The court of appeals' decision below definitively resolved the RFRA claim against Petitioners and left nothing to be determined on remand. Though the Tenth Circuit affirmed the denial of a preliminary injunction, its legal ruling on the merits forecloses Petitioners' pursuit of their RFRA claim as a matter of law.

In addition, because the various Petitioners sponsor different kinds of health plans, this case would enable the Court to address a number of scenarios in a single case.

Insured Plans: Oklahoma Baptist University and Oklahoma Wesleyan University offer insured plans to their employees.

Self-insured Plans: Southern Nazarene University offers a self-insured plan to its employees.

Self-insured Church Plan: Mid-America Christian University offers employee health benefits through a self-insured church plan provided by

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contraceptives at issue," *Hobby Lobby*, 134 S. Ct. at 2780, by providing subsidized contraceptive coverage for employees of religious objectors on government health care exchanges.

GuideStone Financial Resources of the Southern Baptist Convention.

Student plans: Southern Nazarene University and Oklahoma Baptist University offer student health plans. *See* 45 C.F.R. § 147.145. Student plans, like church plans, are not subject to ERISA.

Although Petitioners contend that application of the Mandate to *all* these types of health plans substantially burdens their sponsors' religious exercise, both the Tenth Circuit majority and partial dissent distinguished among them in conducting their RFRA analysis. Pet. App. 66a-88a, 132a-139a. The accommodation's alternative compliance mechanism operates differently with respect to various plan types. *See supra* Part II. Consequently, granting review in a case that does not involve a variety of health plan types risks leaving the claims of certain categories of religious nonprofits unresolved.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 24, 2015

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United States Court of Appeals
Tenth Circuit
July 14, 2015

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, by themselves and on behalf of all others similarly situations; CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs-Appellants,

v.

SYLVIA MATTHEWS BURWELL, Secretary of the United States Department of Health & Human Services; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES

No. 13-1540

DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the united states Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants – Appellees.

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; MID-AMERICA CHRISTIAN UNIVERSITY; REACHING SOULS INTERNATIONAL, INC., an Oklahoma not for profit corporation; TRUETT-MCCONNELL COLLEGE, INC., a Georgia nonprofit corporation, by themselves and on behalf of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas nonprofit corporation,

Plaintiffs – Appellees

v.

SYLVIA MATHEWS BURWELL, Secretary of the

Nos. 14-6026 & 14-6028

United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants - Appellants

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67 CATHOLIC THEOLOGIANS AND ETHICISTS; ALABAMA PHYSICIANS FOR LIFE; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN BIBLE SOCIETY; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; AMERICAN CIVIL LIBERTIES UNION; AMERICAN

FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME); AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; ASIAN AMERICANS ADVANCING JUSTICE | AAJC; ASIAN AMERICANS ADVANCING JUSTICE | LOS ANGELES; ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; ASSOCIATION OF GOSPEL RESCUE MISSIONS; BLACK WOMEN'S HEALTH IMPERATIVE; CALIFORNIA WOMEN'S LAW CENTER, NATIONAL WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; CATHOLIC MEDICAL ASSOCIATION; CHRISTIAN LEGAL SOCIETY; CHRISTIAN MEDICAL ASSOCIATION; CHRISTIE'S PLACE; CONCERNED WOMEN FOR AMERICA; DR. R. ALBERT MOHLER, JR.; ETHICS &

RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; FEMINIST MAJORITY FOUNDATION; FORWARD TOGETHER; HIV LAW PROJECT; IBIS REPRODUCTIVE HEALTH; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE AND CHRISTIAN LEGAL SOCIETY; INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION; IPAS; LEGAL MOMENTUM; LIBERTY COUNSEL; LIBERTY UNIVERSITY; LIBERTY, LIFE, AND LAW FOUNDATION; LUTHERAN CHURCH - MISSOURI SYNOD; MERGER WATCH; NARAL PRO-CHOICE AMERICA; NARAL PRO-CHOICE COLORADO; NARAL PRO-CHOICE WYOMING; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF CATHOLIC NURSES; NATIONAL ASSOCIATION OF EVANGELICALS; NATIONAL ASSOCIATION OF PRO LIFE NURSES; NATIONAL CATHOLIC BIOETHICS

CENTER; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL WOMEN AND AIDS COLLECTIVE; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S LAW CENTER; PLANNED PARENTHOOD ASSOCIATION OF UTAH; PLANNED PARENTHOOD OF KANSAS AND MIDMISSOURI; PLANNED PARENTHOOD OF THE HEARTLAND; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; POPULATION CONNECTION; PRISON FELLOWSHIP MINISTRIES; RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED; SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU); SEXUALITY

INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS); SOUTHERN BAPTIST THEOLOGICAL SEMINARY; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,

Amici Curiae.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 1:13-CV-02611-WJM-BNB) & THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. Nos. 5:13-CV-01015-F & 5:13-CV-01092-D)

Mark L. Rienzi, Becket Fund for Religious Liberty, Washington, DC (Daniel Blomberg and Adele Auxier Keim, Becket Fund for Religious Liberty, Washington, DC; Carl C. Scherz and Seth Roberts, Locke Lord LLP, Dallas, Texas; and Kevin C. Walsh, University of Richmond Law School, Richmond, Virginia, with him on the briefs), appearing for Little Sisters of the Poor Home for the Aged, Little Sisters of the Poor, Baltimore, Inc., Christian Brothers Services, Christian Brothers Employee Benefit Trust, Reaching Souls International, Inc., Truett–McConnell College, Inc., and GuideStone Financial Resources of the Southern Baptist Convention.

Adam C. Jed, Attorney, Appellate Staff, Civil Division (Stuart F. Delery, Assistant Attorney General; Sanford C. Coats and John F. Walsh, United States Attorneys; Beth S. Brinkmann, Deputy Assistant Attorney General; Mark B. Stern, Alisa B. Klein, Patrick G. Nemeroff, and Megan Barbero, Attorneys, Appellate Staff Civil Division, with him on the briefs), United States Department of Justice, Washington, DC, appearing for Sylvia Mathews Burwell, United States Department of Health and Human Services, Thomas E. Perez, Jacob J. Lew, and United States Department of the Treasury.

Gregory S. Baylor, Alliance Defending Freedom, Washington, DC (Matthew W. Bowman, Alliance Defending Freedom, Washington, DC, David A. Cortman, Alliance Defending Freedom, Lawrenceville, Georgia, and Kevin H. Theriot, Alliance Defending Freedom, Leawood, Kansas, with him on the briefs), appearing for Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid–America Christian University.

Before MATHESON, McKAY, and BALDOCK, Circuit Judges.

MATHESON, Circuit Judge.

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GLOSSARY

This opinion is heavily laden with terms from the applicable statute and regulations, types of health insurance arrangements, and names of numerous entities. We appreciate the challenge this presents to the reader and provide this glossary to help navigate the opinion.

Legal and Regulatory Terms:

ACA: The Affordable Care Act, which encompasses the Patient Protection and Affordable Care Act, enacted on March 23, 2010, and the Health Care and Education Reconciliation Act, enacted on March 30, 2010.

Accommodation scheme: A regulatory mechanism that allows religious non-profit organizations to relieve themselves of their obligation to provide contraceptive coverage for employees by either (a) sending a form to their health insurance issuer or third-party administrator or (b) sending a notification to the Department of Health and Human Services.

ANPRM: Advance Notice of Proposed Rulemaking, which an administrative agency may issue to notify the public it is contemplating rulemaking and to invite comments.

Departments: The Department of Health and Human Services, Department of Labor, and Department of the Treasury, which collectively implement the ACA.

EBSA: The Employee Benefits Security Administration, an agency within the Department of Labor.

ERISA: The Employee Retirement Income Security Act, codified at 29 U.S.C. § 1001 *et seq.*, which is a federal law that sets minimum standards for certain employer-sponsored benefit plans.

Form 700: A standardized notification that religious non-profit organizations may send to their health insurance issuer or third party administrator under the accommodation scheme to self-certify they object to providing contraceptive coverage.

HHS: The Department of Health and Human Services, which is one of the three departments tasked with implementing the ACA and contraceptive coverage requirement.

HRSA: The Health Resources and Services Administration, an agency within HHS, which issued guidelines requiring coverage of all FDA-approved contraceptive methods under the ACA.

IOM: The Institute of Medicine, an independent body that reviewed evidence on women's preventive services and issued a report used by the HRSA in formulating its guidelines.

IRC: The Internal Revenue Code, codified at 26 U.S.C. § 1 *et seq.*, which is a comprehensive compilation of the federal tax laws.

Mandate: Regulations enacted under the ACA requiring employer-sponsored group health plans to cover contraceptive services for women as a form of preventive care.

RFRA: The Religious Freedom Restoration Act, codified at 42 U.S.C. § 2000bb–1 *et seq.*, which states that laws that substantially burden a person's exercise of religion are only permissible if they are the least restrictive means of furthering a compelling governmental interest.

RLUIPA: The Religious Land Use and Institutionalized Persons Act, codified at 42 U.S.C. § 2000cc *et seq.*, which states that laws that substantially burden religious exercise through land use restrictions or restrictions on prisoners are only permissible if they are the least restrictive means of furthering a compelling governmental interest.

Religious employers: As defined by reference to §§ 6033(a)(3)(A)(i) or (iii) of the IRC, employers that are organized and operate as non-profit entities and are churches, their integrated auxiliaries, conventions or associations of churches, or the exclusively religious activities of any religious order.

Religious non-profit organizations: Organizations that do not qualify as religious employers but are eligible for an accommodation from the contraceptive coverage requirement because they have religious objections to providing contraceptive coverage, are organized and

operate as non-profit entities, hold themselves out as religious organizations, and self-certify that they satisfy these criteria. The Plaintiffs in these cases are religious non-profit organizations.

Health Insurance Terms:

Group health plan: A benefit plan established or maintained by an employer that provides health insurance to employees and their dependents either directly—a self-insured group health plan—or through a health insurance issuer—an insured group health plan.

Health insurance issuer: A health insurance company, service, or organization that must be licensed to engage in the insurance business and is subject to state laws regulating insurance.

Insured group health plan: A benefit plan in which the employer employs a health insurance issuer to assume the risk of providing health insurance.

Plan participants and beneficiaries: Individuals who are covered by a group health plan.

Self-insured group health plan: A benefit plan in which the employer assumes the risk of providing health insurance.

Self-insured church plan: A self-insured group health plan established by a church or association of churches covering the church or association's employees, which is not subject to

regulation under ERISA unless it has elected to opt in to ERISA's provisions.

TPA: A third-party administrator, which is an entity that processes insurance claims and provides administrative services for employers with self-insured group health plans.

Plaintiffs and Related Entities:

Little Sisters of the Poor:

Little Sisters of the Poor: A religious non-profit organization that provides health care to employees through the Christian Brothers Employee Benefit Trust.

Christian Brothers Employee Benefit Trust: A self-insured church plan that is not subject to ERISA and uses Christian Brothers Services as its TPA.

Christian Brothers Services: The TPA for the Christian Brothers Employee Benefit Trust.

Southern Nazarene:

Southern Nazarene University: A religious non-profit organization that is self-insured up to $100,000 and provides health care to employees through Blue Cross Blue Shield for claims above $100,000.

Oklahoma Baptist University: A religious non-profit organization insured by Blue Cross Blue Shield of Oklahoma.

Oklahoma Wesleyan University: A religious non-profit organization insured by Community Care of Oklahoma.

Mid–America Christian University: A religious non-profit organization that provides health care to employees through plans provided by GuideStone Financial Resources.

Reaching Souls:

Reaching Souls: A religious non-profit organization that provides health care to employees through the GuideStone Plan.

Truett–McConnell College: A religious non-profit organization that provides health care to employees through the GuideStone Plan.

GuideStone Financial Resources: A religious non-profit organization that sponsors the GuideStone Plan and has arranged for TPAs to provide claims administration under that plan.

GuideStone Plan: A self-insured church plan that is not subject to ERISA and uses entities like Connecticut General Life Insurance Company, Highmark Health Services, and Express Scripts, Inc. as its TPAs.

I. INTRODUCTION

When Congress passed the Affordable Care Act ("ACA") in 2010, it built upon the widespread use of employer-based health insurance in the United

States.[1] The ACA and its implementing regulations require employers who provide health insurance coverage to their employees to include coverage for certain types of preventive care without cost to the insured. The appeals before us concern the regulations that require group health plans to cover contraceptive services for women as a form of preventive care ("Mandate").[2]

In response to religious concerns, the Departments implementing the ACA—Health and Human Services ("HHS"), Labor, and Treasury—adopted a regulation that exempts religious employers—churches and their integrated auxiliaries—from covering contraceptives. When religious non-profit organizations complained about their omission from this exemption, the Departments adopted a regulation that allows them to opt out of providing, paying for, or facilitating

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[1] A majority of the nonelderly population in the United States receives health insurance as a job benefit through an employer. *See* Melissa Majerol, Vann Newkirk & Rachel Garfield, *The Uninsured: A Primer—Key Facts About Health Insurance and the Uninsured in America,* The Kaiser Commission on Medicaid and the Uninsured, 1 (Jan.2015), ht tp:// files.kff.org/attachment /the-uninsured-a-primer-key-facts-about-healthinsurance-and-the-uninsured-in-america-primer.

[2] We use "Mandate" as shorthand for the ACA's employer mandate, which requires employers who offer health benefits to comply with the coverage requirements detailed in the ACA and its implementing regulations. This Mandate is distinct from the individual mandate at issue in *National Federation of Independent Business v. Sebelius,* 132 S.Ct. 2566 (2012), which generally requires individuals to maintain health insurance.

contraceptive coverage.[3] Under this regulation, a religious non-profit organization can opt out by delivering a form to their group health plan's health insurance issuer or third-party administrator ("TPA") or by sending a notification to HHS.

The Plaintiffs in the cases before us are religious non-profit organizations. They contend that complying with the Mandate or the accommodation scheme imposes a substantial burden on their religious exercise. The Plaintiffs argue the Mandate and the accommodation scheme violate the Religious Freedom Restoration Act ("RFRA") and the Religion and Speech Clauses of the First Amendment.[4]

Although we recognize and respect the sincerity of Plaintiffs' beliefs and arguments, we conclude the

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[3] Plaintiffs object to the term "opt out" because their accommodation from the Mandate involves an act on their part—self-certification—that they deem objectionable. We believe "opt out" is accurate. Self-certifying for the accommodation expressly relieves Plaintiffs of their obligation to provide, pay for, or facilitate contraceptive coverage, and does so without substantially burdening their religious exercise. Under these conditions, the self-certification is accurately characterized as an "opt out." By definition, all opt-out mechanisms require some affirmative act by objecting parties.

[4] RFRA applies to all subsequent federal statutes absent a specific exemption by Congress. *See* 42 U.S.C. § 2000bb–3(b) ("Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter."). The ACA, enacted in 2010, did not contain a specific exemption and is subject to RFRA. *See Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1157 (10th Cir.2013).

accommodation scheme relieves Plaintiffs of their obligations under the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights. Exercising jurisdiction under 28 U.S.C. § 1292(a), we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters of the Poor Home for the Aged v. Sebelius*, 6 F.Supp.3d 1225 (D.Colo.2013), and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene University v. Sebelius*, No. CIV–13–1015–F, 2013 WL 6804265 (W.D.Okla. Dec.23, 2013), and *Reaching Souls International, Inc. v. Burwell*, No. CIV–13–1092–D, 2013 WL 6804259 (W.D.Okla. Dec.20, 2013).

II. *HOBBY LOBBY* AND THIS CASE

Last year, the Supreme Court decided *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), in which closely-held for-profit corporations challenged the Mandate under RFRA. The difference between *Hobby Lobby* and this case is significant and frames the issue here. In *Hobby Lobby*, the plaintiff for-profit corporations objected on religious grounds to providing contraceptive coverage and could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties. *Id.* at 2759–60. In the cases before us, the plaintiff religious non-profit organizations can avail themselves of an accommodation that allows them to opt out of providing contraceptive coverage without penalty. Plaintiffs contend the process to opt out substantially burdens their religious exercise.

In other words, unlike in *Hobby Lobby*, the Plaintiffs do not challenge the general obligation under the ACA to provide contraceptive coverage. They instead challenge the process they must follow to get out of complying with that obligation. The Plaintiffs do not claim the Departments have not tried to accommodate their religious concerns. They claim the Departments' attempt is inadequate because the acts required to opt out of the Mandate substantially burden their religious exercise. As we discuss more fully below, however, the accommodation relieves Plaintiffs of their obligation to provide, pay for, or facilitate contraceptive coverage, and does so without substantially burdening their religious exercise.

III. BACKGROUND

We begin by providing background information on the ACA and its implementing regulations, the Plaintiffs objecting to the accommodation scheme, and the procedural history of the three cases before us.

A. *Regulatory Background*

The regulations at issue in these cases have evolved in significant ways since their initial promulgation. We review: (1) the exemption from the ACA's contraceptive coverage requirement for churches and integrated auxiliaries, (2) the accommodation scheme for religious non-profit organizations, and (3) the mechanics of the accommodation scheme for different types of group health plans.

1. The ACA Mandate and the Religious Employer Exemption

Under the ACA, employer-sponsored group health plans must meet minimum coverage requirements. As part of these requirements, both group health plans and health insurance issuers must cover preventive health care services and cannot require plan participants and beneficiaries to share the costs of these services through co-payments, deductibles, or co-insurance. 42 U.S.C. § 300gg–13. On July 19, 2010, the Departments issued interim final rules implementing the ACA's requirements for preventive services. Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed.Reg. 41,726 (July 19, 2010).

Among the services required by the ACA are preventive care and screenings for women "as provided for in comprehensive guidelines supported by the Health Resources and Services Administration" ("HRSA"), a federal agency within HHS. 42 U.S.C. § 300gg–13(a)(4). On August 1, 2011, after receiving recommendations from the Institute of Medicine ("IOM"), the HRSA issued its guidelines for women's preventive health services. The guidelines include coverage of "[a]ll Food and Drug Administration [("FDA")] approved contraceptives, sterilization procedures, and patient education and counseling for all women with reproductive capacity," as prescribed by a health care provider. HRSA, Women's Preventive Services

Guidelines, http:// www.hrsa.gov/womensguidelines (last visited Mar. 25, 2015).

In accordance with the HRSA's guidelines, the Departments require coverage of the full range of FDA-approved contraceptive services. *See*26 C.F.R. § 54.9815–2713(a)(1)(iv); 29 C.F.R. § 2590.715–2713(a)(1)(iv); 45 C.F.R. § 147.130(a)(1)(iv). Not all employers, however, are required to comply with the Mandate.

First, employers with 50 or fewer employees are exempt from the Mandate because they are not required to offer insurance under the ACA. *See*26 U.S.C. §§ 4980H(c)(2)(A), 4980D(d).

Second, "grandfathered" plans are exempt from the Mandate because the ACA allows individuals to temporarily maintain the health coverage they possessed before the ACA was enacted. *See*42 U.S.C. § 18011.[5]

Third, and the most relevant here, is the exemption for religious employers. In response to

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[5] The exception for grandfathered plans is temporary and transitional. A health plan loses its grandfathered status—and is subject to the Mandate—when it eliminates benefits, increases cost sharing requirements, or changes the terms of employer contributions. *See*45 C.F.R. § 147.140(g). In 2011, 56 percent of individuals who receive health care from their employer were covered by grandfathered plans; in 2014, only 26 percent were covered by grandfathered plans. *See* Kaiser Family Foundation & Health Research & Educational Trust, *Employer Health Benefits: 2014 Annual Survey*, 7 (2014), h ttp://files.kff.org/attachmen t/2014–employer–health–benefits–survey–fullreport.

concerns from religious organizations, the Departments amended the interim final regulations to give the HRSA authority to exempt group health plans established or maintained by religious employers. *See*Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed.Reg. 46,621, 46,623 (Aug. 3, 2011). The Departments defined a "religious employer" as one that: "(1) Has the inculcation of religious values as its purpose; (2) primarily employs persons who share its religious tenets; (3) primarily serves persons who share its religious tenets; and (4) is a nonprofit organization described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code."*Id.* The cited sections "refer to churches, their integrated auxiliaries, and conventions or associations of churches, as well as the exclusively religious activities of any religious order."*Id.* The Departments noted the definition was intended "to reasonably balance the extension of any coverage of contraceptive services under the HRSA Guidelines to as many women as possible, while respecting the unique relationship between certain religious employers and their employees in certain religious positions."*Id.*[6] They invited comments on the proposed definition of "religious employer" and potential alternatives. *Id.*

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[6] A number of states have laws that require employers to cover contraceptive services but excuse some religious employers from complying. The Departments developed their definition to accord with these existing state laws. *See*76 Fed.Reg. at 46,623.

The Departments received more than 200,000 responses to their request for comments from a variety of entities both supporting and opposing expansion of the proposed exemption. *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed.Reg. 8725, 8726 (Feb. 15, 2012). After reviewing these comments, they published final regulations on February 15, 2012, adopting their proposed definition of "religious employer." *Id.* at 8727. They also created a one-year safe harbor for religious non-profit organizations, during which the Departments would not enforce the Mandate against them. *Id.* at 8728.

2. The Accommodation Scheme for Religious Non–Profit Organizations

In response to religious groups that were dissatisfied with the scope of the proposed religious employer exemption, the Departments issued an advance notice of proposed rulemaking ("ANPRM") in anticipation of creating additional accommodations for non-exempt religious non-profit organizations. Certain Preventive Services Under the Affordable Care Act, 77 Fed.Reg. 16,501 (Mar. 21, 2012). After reviewing the comments received from the ANPRM, the Departments published proposed rules creating an accommodation for a wider range of religious non-profit organizations. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed.Reg. 8456 (Feb. 6, 2013).

The Departments received over 400,000 comments on the proposed rules, and finalized two notable changes. Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed.Reg. 39,870, 39,871 (July 2, 2013). First, the Departments simplified and clarified the existing exemption for religious employers by eliminating the first three elements of the definition, thereby defining "religious employer" as "an employer that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (iii) of the [Internal Revenue] Code [("IRC")]."*Id.* at 39,874. Second, they created an accommodation for religious non-profit organizations that did not meet this simplified definition of a religious employer. *Id.*

The regulations state a religious non-profit organization can receive this accommodation if it: (1) has religious objections to "providing coverage for some or all of the contraceptive services required to be covered" under the Mandate, (2) "is organized and operates as a nonprofit entity," (3) "holds itself out as a religious organization," and (4) "self-certifies that it satisfies the first three criteria."*Id.* The accommodation is available for both (1) insured group health plans, under which an employer contracts with a health insurance issuer to assume the risk of providing benefits to employees, and (2) self-insured group health plans, under which the employer itself assumes the risk of providing benefits to employees. *Id.* at 39,875–80.[7] As we

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[7] Employers with self-insured group health plans typically employ a TPA to coordinate logistics and deliver benefits. Cong. Budget Office, *Key Issues in Analyzing Major Health Insurance*

explain below, religious non-profit organizations can self-certify their religious objection and receive the accommodation either by notifying their health insurance issuer or TPA or by notifying HHS directly.

a. EBSA Form 700

To self-certify under the accommodation scheme, the Departments initially required religious non-profit organizations to use the Employee Benefits Security Administration's ("EBSA") Form 700 ("Form").[8] Objecting organizations are relieved from complying with the Mandate by delivering the executed Form to their health insurance issuer or TPA. The Form notifies the health insurance issuer or TPA that the organization self-certifies as exempt from the Mandate because it has a religious objection to providing coverage for some or all contraceptive services to its employees, and identifies the relevant federal regulations under which the organization is permitted to opt out of that obligation. *See* Dep't of Labor, EBSA Form 700 (Aug.2014), http://www.dol.gov/ebsa/preventiveserviceseligibleorganizationcertificationform.doc (citing 26 C.F.R. § 54.9815–2713A(a); 29 C.F.R. § 2590.715–2713A(a); 45 C.F.R. § 147.131(b)).

Proposals, 6 (Dec.2008), http://www.cbo.gov/sites/default/files/12–18–keyissues.pdf.

[8] A copy of the Form appears at the end of this opinion.

The back of the Form notifies TPAs of their obligations.[9] Form at 2. It informs the TPA that the eligible organization "[w]ill not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services."Form at 2. It identifies regulations requiring the TPA to provide contraceptive coverage without cost sharing to plan participants and beneficiaries if the TPA agrees to continue providing administrative services for a group health plan. *Id.* (citing 26 C.F.R. § 54.9815–2713A; 29 C.F.R. § 2510.3–16; 29 C.F.R. § 2590.715–2713A). A TPA that receives the Form from an objecting employer is eligible for a government payment to cover the costs of providing contraceptive coverage. *See*45 C.F.R. § 156.50(d)(5).

As part of this scheme, the regulations initially included a non-interference provision, which specified that objecting religious non-profit organizations "must not, directly or indirectly, seek to influence the third party administrator's decision" whether to provide coverage for contraceptives. 26 C.F.R. § 54.9815–2713A(b)(iii) (2013). When the Plaintiffs filed their suits, they sought a preliminary injunction relieving them from complying with this version of the accommodation scheme, arguing delivery of the Form to their health insurance issuer or TPA constituted a substantial burden on their

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[9] The notice of regulatory requirements on the back of the Form is specifically addressed to TPAs. See Form at 2. The legal obligations of health insurance issuers are evident from the text of the ACA itself. See42 U.S.C. § 300gg–13.

religious exercise in violation of RFRA and the First Amendment.

b. Alternative notice

In response to litigation by Plaintiffs and others, the Departments have since expanded the accommodation scheme.[10] The Supreme Court granted injunctions pending appeal in two suits brought by religious non-profit organizations, including the Little Sisters, that objected to the accommodation scheme. *See Wheaton Coll. v. Burwell*, 134 S.Ct. 2806 (2014); *Little Sisters of the Poor Home for the Aged, Denver, Colo. v. Sebelius*, 134 S.Ct. 1022 (2014). In a third suit, the Court declined to recall or stay a circuit court mandate in favor of the Government, but granted an injunction to religious non-profit organizations pending final disposition of their petition for certiorari. *See Zubik v. Burwell*, Nos. 14A1065, 14–1418, 2015 WL 3947586, at *1 (U.S. June 29, 2015). The injunctions allowed the organizations to notify HHS directly of their religious objection to the Mandate rather than sending the Form to their health insurance issuers or TPAs. In response to the injunction in *Wheaton College*, the Departments issued an interim final rule on August 27, 2014, creating an alternative accommodation for religious non-profit organizations. Coverage of Certain Preventive

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[10] As we explain in this section, the Departments did not expand the pool of actors who could claim an accommodation and obtain relief from the Mandate. They expanded the accommodation scheme by offering objecting organizations an alternative method of self-certification.

Services Under the Affordable Care Act, 79 Fed.Reg. 51,092, 51,092 (Aug. 27, 2014).[11]

These regulations relieve a religious non-profit organization from complying with the Mandate if it notifies HHS in writing of its religious objection to the provision of some or all contraceptive services. *Id.* at 51,094. The notice may be sent by letter or email, and must contain (1) "the name of the eligible organization and the basis on which it qualifies for an accommodation," (2) "its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services," including any particular subset to which it objects; (3) the name and type of the group health plan; and (4) the name and contact information for any of the plan's TPAs

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[11] We discuss the procedural history of the cases before us below, but note that this alternative accommodation is akin to the accommodation granted by the Supreme Court in the cases mentioned above—*Little Sisters*, 134 S.Ct. 1022, *Wheaton College*, 134 S.Ct. 2806; and *Zubik*, 2015 WL 3947586:

> If the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services, the respondents are enjoined from enforcing against the applicant the challenged provisions of the Patient Protection and Affordable Care Act and related regulations pending final disposition of appellate review. To meet the condition for injunction pending appeal, the applicant need not use the form prescribed by the Government, EBSA Form 700, and need not send copies to health insurance issuers or third-party administrators.

Wheaton Coll., 134 S.Ct. at 2807.

and/or health insurance issuers. *Id.* at 51,094–95. According to the Departments, these requirements constitute "the minimum information necessary for the Departments to determine which entities are covered by the accommodation, to administer the accommodation, and to implement the policies in the July 2013 final regulations."*Id.* at 51,095.

The revised regulations also repeal the non-interference provision by deleting language prohibiting organizations from interfering with or seeking to influence their TPA's decision to cover contraception. *Id.*[12]

We note again that the entirety of this accommodation scheme for religious non-profit organizations—using either the Form or the alternative notice to HHS—was not available to the for-profit corporate plaintiff in *Hobby Lobby*. Here,

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[12] The regulations explain the rationale for this change:

> The Departments interpret the July 2013 final regulations solely as prohibiting the use of bribery, threats, or other forms of economic coercion in an attempt to prevent a third party administrator from fulfilling its independent legal obligations to provide or arrange separate payments for contraceptive services. Because such conduct is generally unlawful and is prohibited under other state and federal laws, and to reduce unnecessary confusion, these interim final regulations delete the language prohibiting an eligible organization from interfering with or seeking to influence a third party administrator's decision or efforts to provide separate payments for contraceptive services.

79 Fed.Reg. at 51,095.

an accommodation is available to Plaintiffs. In the cases before us, we consider whether their taking advantage of that accommodation to opt out of the Mandate is itself a substantial burden on their religious exercise.

3. The Mechanics of the Accommodation for Insured Plans, Self-Insured Plans, and Self-Insured Church Plans

The Plaintiffs use different types of employer-sponsored group health plans, which the Departments treat differently within the accommodation scheme. By its own terms, the ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. 42 U.S.C. § 300gg–13 ("A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for ... with respect to women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph."); 26 C.F.R. § 54.98152713(a)(1); 29 C.F.R. § 2590.715–2713(a)(1); 45 C.F.R. § 147.130(a)(1). Because the differences among these arrangements are relevant to our discussion of the merits of Plaintiffs' claims, we consider it helpful to explain how the Mandate and accommodation scheme affect insured plans, self-insured plans, and self-insured church plans.

a. Insured plans

When a religious non-profit organization offers its employees an insured plan, the statutory language not only requires the group health plan to cover contraception, but also obligates the plan's health insurance issuer to ensure plan participants and beneficiaries receive contraceptive coverage. *See*42 U.S.C. §§ 300gg–13; 300gg–22. Thus, even if a religious non-profit organization does not self-certify that it has an objection, its health insurance issuer is obligated to provide contraceptive coverage to plan participants and beneficiaries and charge the organization for the cost. *See Priests for Life v. U.S. Dep't of Health & Hum. Servs.*, 7 F.Supp.3d 88, 95–96 & n.2 (D.D.C.2013). The organization can free itself from complying with the Mandate and paying for that coverage, however, "if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services."26 C.F.R. § 54.9815–2713AT(c)(1); 29 C.F.R. § 2590.715–2713A(c)(1); 45 C.F.R. § 147.131(c)(1). When an organization submits the Form expressing an objection to providing contraceptive coverage, "the issuer has sole responsibility for providing such coverage in accordance with § 147.130."45 C.F.R. § 147.131(c)(1)(i); *see also*26 C.F.R. § 54.9815–2713AT(c)(1)(i) (requiring coverage in accordance with § 54.9815–2713); 29 C.F.R. § 2590.715–2713A(c)(1)(i) (requiring coverage in accordance with § 2590.715–2713). Similarly, when an organization notifies HHS, the Department of Labor will send a separate notification to the organization's issuer

informing it of that notice and describing its regulatory obligations. 45 C.F.R. § 147.131(c)(1)(ii); *see also*26 C.F.R. § 54.9815–2713AT(c)(1)(ii); 29 C.F.R. § 2590.715–2713A(c)(1)(ii).

In the context of insured plans, health insurance issuers are generally responsible for paying for contraceptive coverage when a religious non-profit organization opts out. *See* 45 C.F.R. § 156 .50. The Departments expect this will be cost-neutral for issuers because of the cost savings that accompany improvements in women's health and lower pregnancy rates. *See* 78 Fed.Reg. at 39,877.

b. Self-insured plans

When a religious non-profit organization offers its employees a self-insured plan, the accommodation works in a slightly different fashion. A self-insured group health plan complies with the regulatory requirements and is excused from providing contraceptive coverage if "[t]he eligible organization or its plan contracts with one or more third party administrators" and "[t]he eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services."26 C.F.R. § 54.9815–2713AT(b)(1); 29 C.F.R. § 2590.715–2713A(b)(1).

Although the text of the ACA does not specify a role for TPAs, it expressly requires group health plans to include contraceptive coverage, and federal

regulations impose obligations on TPAs that administer self-insured group health plans. *See*42 U.S.C. § 300gg–13; 26 C.F.R. § 54.9815–2713AT(b); 29 C.F.R. § 2590.715–2713A(b). The regulations require a TPA administering a group health plan to provide or arrange for contraceptive coverage without cost sharing with the organization or its beneficiaries when it: (1) receives a notification that an eligible employer has opted out of providing coverage and (2) decides to remain in a relationship with that employer or its plan to provide administrative services for the plan. 26 C.F.R. § 54.9815–2713AT(b)(2); 29 C.F.R. § 2590.715–2713A(b)(2). The TPA's obligations are enforceable under the Employee Retirement Income Security Act ("ERISA").*See* 78 Fed.Reg. at 39,879–80.

In the context of self-insured plans, a TPA may seek reimbursement if it has received the Form or a notification from the government and "provides or arranges payments for contraceptive services."*See* 26 C.F.R. § 54.9815–2713AT(b)(3); 29 C.F.R. § 2590.715–2713A(b)(3); 45 C.F.R. § 156.50(d)(2)(ii)-(iii). TPAs do so by working through health insurance issuers, who receive adjustments to fees they pay to the government under the ACA and pass along the reimbursements to TPAs. *See*45 C.F.R. § 156.50(d).

c. Self-insured church plans

Although federal regulations impose certain requirements on TPAs, the Departments concede they lack authority to enforce those requirements as to self-insured "church plans," which are group

health plans established by a church or association of churches covering the church's or association's employees. 29 U.S.C. § 1002(33). Organizations that provide health care coverage for employees through self-insured church plans are exempt from regulation under ERISA. 29 U.S.C. § 1003(b)(2). Unless a church plan has made an election under 26 U.S.C. § 410(d), which opts plans into provisions of ERISA, the Departments concede they lack authority to compel church plan TPAs to provide contraceptive coverage, and may not levy fines against those TPAs for failing to provide it.

d. Legal obligation to provide coverage after the accommodation

Although the accommodation is available for both insured and self-insured group health plans, the source of the legal obligation to provide contraceptive coverage after a religious non-profit organization has opted out differs based on the type of insurance arrangement the organization uses. When an organization takes advantage of the accommodation, the ACA requires health insurance issuers to provide coverage for insured group health plans, while federal regulations adopted pursuant to the ACA require TPAs to arrange coverage for self-insured group plans that are subject to ERISA. As we discuss below, these distinctions shape the claims advanced by different Plaintiffs in the cases before us.

B. The Plaintiffs

The Plaintiffs[13] in this litigation object to both means to receive an accommodation—sending the Form to their health insurance issuer or TPA or sending a notification to HHS. The Plaintiffs differ from each other in ways that are relevant to the Departments' authority to require employers to provide contraceptive coverage and relieve objecting religious non-profit organizations from the Mandate when they use the accommodation scheme.

1. *Little Sisters of the Poor*

The Little Sisters of the Poor Home for the Aged, Denver, Colorado and Little Sisters of the Poor, Baltimore ("Little Sisters") belong to an order of Catholic nuns who devote their lives to care for the elderly. The Little Sisters provide health insurance coverage to their employees through the Christian Brothers Employee Benefit Trust ("Trust"), a self-insured church plan that is not subject to ERISA. The Trust uses Christian Brothers Services ("Christian Brothers"), another Catholic organization, as its TPA.

The Little Sisters have always excluded coverage of sterilization, contraception, and abortifacients from their health care plan in accordance with their religious belief that deliberately avoiding reproduction through medical means is immoral. The Little Sisters "believe that it is wrong for them

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[13] When we refer to the plaintiffs in all three cases collectively, we use "Plaintiffs." When we refer to a subset of the plaintiffs, we use "plaintiffs."

to intentionally facilitate the provision of these medical procedures, drugs, devices, and related counseling and services." LS Br. at 10. They cite "well-established Catholic teaching that prohibits encouraging, supporting, or partnering with others in the provision of sterilization, contraception, and abortion."LS Br. at 9–10. The Little Sisters contend they "cannot provide these things, take actions that directly cause others to provide them, or otherwise appear to participate in the government's delivery scheme," as the mere appearance of condoning these services "would violate their public witness to the sanctity of human life and human dignity and could mislead other Catholics and the public." LS Br. at 10.

The Little Sisters are subject to the Mandate unless they take advantage of the accommodation scheme by delivering the Form to the Christian Brothers, their TPA, or notifying HHS of their religious objection. If they do not take one of these steps and do not provide contraceptive coverage, they estimate a single Little Sisters home could incur penalties of up to $2.5 million per year, and allege the Trust could lose up to $130 million in plan contributions. The *Little Sisters* plaintiffs object that the accommodation scheme violates their sincerely held religious beliefs because they cannot take actions that directly cause others to provide contraception or appear to participate in the Departments' delivery scheme.

2. *Southern Nazarene*

Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid–America Christian University are "Christ-centered institutions of higher learning." SN Br. at 1–2. Southern Nazarene is partially self-insured; it generally assumes the risks of providing coverage but contracts with a health insurance issuer to pay all claims over $100,000. For its insured employee coverage, it uses Blue Cross Blue Shield of Oklahoma. It offers separate coverage to students through an insured plan. Oklahoma Baptist is an insured university. It uses Blue Cross Blue Shield of Oklahoma, and offers separate coverage to students through an insured plan. Oklahoma Wesleyan is an insured university. It uses Community Care of Oklahoma. Mid–America Christian is a self-insured university on a church plan that is not subject to ERISA. It uses plans provided by GuideStone Financial Resources.[14]

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[14] The descriptions of Mid–America Christian's insurance arrangements in the record before us are inconsistent. Before the district court, counsel described Mid–America Christian's plan as "insured by GuideStone," App. in SN at A32, and suggested it would be obligated, like Oklahoma Baptist and Oklahoma Wesleyan, to deliver the Form to its health insurance issuer to opt out of the Mandate. In its opening brief on appeal, counsel described Mid–America Christian's plan as "self-insured," and suggested it would be obligated, like Southern Nazarene, to deliver the Form to its TPA. SN Br. at 2, 18. In a supplemental brief and at oral argument, counsel now indicates Mid–America Christian has a self-insured church plan and is more akin to the *Reaching Souls* plaintiffs. SN Supp. Br. II at 9 n.2; Oral Arg. in SN at 20:24–20:32.

The universities have brought suit collectively, but they are in slightly different positions insofar as Mid–America Christian University uses a church plan and contracts with a TPA, Oklahoma Baptist University and Oklahoma Wesleyan use health insurance issuers, and Southern Nazarene contracts with a TPA but uses a health insurance issuer for student coverage and employee claims above $100,000.

The universities believe "it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to abortion, abortion-inducing drugs and devices, and related counseling."SN Br. at 1–2. They object to the provision of contraceptives they consider abortifacients. The universities currently offer health plans to students and employees that do not cover the contraceptives the universities find objectionable.

The universities are subject to the Mandate, but they may take advantage of the accommodation scheme by delivering the Form or notifying HHS of their religious objections to relieve themselves of the

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We treat Mid–America Christian's plan as a self-insured church plan. The parties in *Southern Nazarene* stipulated as fact that Mid–America Christian's group health plan is provided by GuideStone Financial Resources. *Southern Nazarene*, 2013 WL 6804265, at *2. Because we understand GuideStone Financial Resources to be a sponsor of self-insured church plans and not an insurer, we assume the latest characterization on appeal is correct and treat Mid–America Christian's group health plan as a self-insured church plan that is not subject to ERISA.

obligation to provide contraceptive coverage. They object to the accommodation, however, because they believe it requires them to expressly or functionally offer contraceptive coverage through their group health plan, interferes with the spiritual development of their communities, and requires them to facilitate behavior they consider sinful. If they do not take advantage of the accommodation, each university must either provide coverage or incur penalties of $100 per employee per day.

3. *Reaching Souls*

Reaching Souls is a non-profit corporation founded by a Southern Baptist minister and based in Oklahoma. The organization trains pastors and evangelists and provides care to orphans in Africa, India, and Cuba. Truett–McConnell College is a private liberal arts college based in Georgia. Both Reaching Souls and Truett–McConnell use the GuideStone Plan, a self-insured church plan that is not subject to ERISA. GuideStone Financial Resources, a Texas non-profit corporation, established the GuideStone Plan and holds the assets funding it in trust. GuideStone Financial Resources has entered into agreements with other entities to provide claims administration as TPAs under the GuideStone Plan, including Connecticut General Life Insurance Company, Highmark Health Services, and Express Scripts, Inc.

Reaching Souls believes life begins at conception and objects to four of the twenty FDA-approved methods of contraception that Reaching Souls characterizes as abortifacients. Truett–McConnell

has adopted the Southern Baptist Convention's statement of faith and objects to the same four methods of contraception. GuideStone Financial Resources, as an arm of the Southern Baptist Convention, also opposes coverage of contraception methods it believes to be abortifacients. The organizations ground their beliefs in the sanctity of human life and opposition to elective abortion in the religious teachings of the Southern Baptist Convention.

Both Reaching Souls and Truett–McConnell College are subject to the Mandate, but they may take advantage of the accommodation scheme by delivering the Form or notifying HHS of their religious objections. If they do, GuideStone Financial Resources would have to pass the information to the TPAs of the GuideStone Plan to effectuate the coverage. The plaintiffs believe this would violate their religious beliefs "by making them complicit in the government's scheme to provide abortifacients."RS Br. at 4. If the organizations do not take advantage of the accommodation scheme or provide coverage, they contend they will incur millions of dollars in fines, which "would crush the ministries and force a mass exodus from GuideStone."RS Br. at 3.

C. *Procedural History*

The district courts reached different results in the three cases before us, denying a preliminary injunction to the plaintiffs in *Little Sisters* but granting a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls*.Reviewing

the reasoning behind their determinations clarifies the claims before us on appeal.

1. ***Little Sisters of the Poor***

In *Little Sisters*, the district court determined that complying with the accommodation scheme would not impose a substantial burden on the Little Sisters' or Christian Brothers' religious exercise. 6 F.Supp.3d at 1239–45. The court's analysis of the preliminary injunction factors began and ended by examining whether the plaintiffs would suffer irreparable injury if the requested relief were denied. *Id.* at 1236. After determining it was the court's duty to determine how the regulations operate as a matter of law, *id.* at 1239, the court concluded the accommodation scheme does not require the Little Sisters to provide contraceptive coverage or to participate in the provision of contraceptive coverage, *id.* at 1239–42.

The court noted that the Little Sisters—unlike the plaintiffs in *Hobby Lobby*—could be relieved of the obligation to provide coverage by signing and delivering the Form to their TPA, the Christian Brothers. *Id.* at 1237.[15] The court underscored that,

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[15] At the time the district courts decided all three of the cases before us, the interim final rules allowing Plaintiffs to opt out by notifying HHS of their religious objection had not yet been issued. The district court decisions therefore focus on the Form and do not consider the expanded accommodation scheme in August 2014's interim final rules. In supplemental briefing to this court, the Plaintiffs argue the expanded scheme does not adequately address the religious liberty concerns they have raised in this litigation.

while the Departments could require the Little Sisters to sign and deliver the Form to their TPA to avoid the Mandate, the Departments lacked enforcement authority under ERISA to levy fines or otherwise force the Christian Brothers to provide contraceptive coverage as the TPA for a self-insured, ERISA-exempt church plan. *Id.* at 1243–44. The court concluded that requiring the Little Sisters to sign and deliver the Form to opt out did not constitute a substantial burden on their religious exercise and declined to issue a preliminary injunction. *Id.* at 1242–45.

The Little Sisters next asked the Tenth Circuit for an injunction pending appeal, which this court denied. The Supreme Court subsequently granted their request for an injunction pending appeal, allowing the Little Sisters to notify HHS of their religious objection instead of sending the Form to their TPA as the regulations at the time required. *See Little Sisters*, 134 S.Ct. 1022. The Little Sisters now appeal the district court's denial of a preliminary injunction.

2. ***Southern Nazarene***

In *Southern Nazarene*, the district court granted a preliminary injunction to the plaintiffs. 2013 WL 6804265, at *11. The court's analysis focused mainly on the plaintiffs' likelihood of success on the merits.[16] *Id.* at *7–10. The court characterized the

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[16] The district court noted that, unlike in the recently decided *Priests for Life*, 7 F.Supp.3d 88, the parties in *Southern Nazarene* "stipulated that the *act of signing the certification* is contrary to the religious beliefs to which these institutions

Form as "in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects." *Id.* at *8. It determined the Form imposed a substantial burden on the plaintiffs' sincere religious exercise and the Government had not articulated a compelling state interest or argued its approach was the least restrictive means of advancing that interest. *Id.* at *7–10.

The court concluded the plaintiffs had shown they were likely to succeed on the merits. *Id.* After reaching this conclusion, it briefly reviewed the other preliminary injunction factors and entered a preliminary injunction that prevented the Departments from enforcing the Mandate, requiring self-certification to opt out, or levying penalties. *Id.* at *10–11. The Government now appeals the district court's ruling.

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subscribe." *Southern Nazarene*, 2013 WL 6804265, at *8. The court's characterization paraphrases the stipulation, which addresses only the litigation position taken by the *Southern Nazarene* plaintiffs. The parties specifically stipulated: "The Universities believe that, within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs." *Id.* at *5. The Government accepts that the *Southern Nazarene* plaintiffs take the position that completing the self-certification would violate their religious beliefs—a fairly straightforward characterization of their litigation position—but has never conceded that completing the self-certification actually would violate their religious beliefs.

3. *Reaching Souls*

Like the district court in *Southern Nazarene*, the district court in *Reaching Souls* granted a preliminary injunction to the plaintiffs. 2013 WL 6804259, at *8. The court primarily analyzed the likelihood of plaintiffs' success on the merits. *Id.* at *6–8. It characterized the Government's substantial burden argument as "simply another variation of a proposition rejected by the court of appeals in *Hobby Lobby*," likening it to the argument that the Mandate was not a substantial burden on for-profit employers because it required intervening acts by third parties—employees deciding whether to acquire contraception. *Id.* at *7. It emphasized that regardless of whether the Form actually triggers the provision of contraceptive services, the plaintiffs believe that signing it would signal their tacit support or cooperation. *Id.*

The court thus determined "the accommodation scheme applies substantial pressure on Plaintiffs to violate their belief that participating in or facilitating the accommodation is the moral equivalent of directly complying with the contraceptive mandate."*Id.* at *8. It briefly reviewed the other preliminary injunction factors and enjoined the Government from requiring the plaintiffs to comply with the Mandate and accommodation scheme or penalizing the plaintiffs for noncompliance. *Id.* The Government now appeals the district court's ruling.

IV. UNUSUAL NATURE OF PLAINTIFFS' CLAIM

Before we present our analysis of the issues, we wish to highlight the unusual nature of Plaintiffs' central claim, which attacks the Government's attempt to accommodate religious exercise by providing a means to opt out of compliance with a generally applicable law.

Most religious liberty claimants allege that a generally applicable law or policy without a religious exception burdens religious exercise, and they ask courts to strike down the law or policy or excuse them from compliance. Our circuit's three most recent RFRA cases fall into this category. In *Hobby Lobby Stores, Inc. v. Sebelius,* 723 F.3d 1114 (10th Cir.2013) (en banc), *aff'd sub nom.Hobby Lobby,* 134 S.Ct. 2751, the ACA required the plaintiffs to provide their employees with health insurance coverage of contraceptives against their religious beliefs. In *Yellowbear v. Lampert,* 741 F.3d 48 (10th Cir.2014), a prison policy denied the plaintiff access to a sweat lodge, where he wished to exercise his Native American religion. In *Abdulhaseeb v. Calbone,* 600 F.3d 1301 (10th Cir.2010), a prison policy denied the plaintiff a halal diet, which is necessary to his Muslim religious exercise. In each instance, the law or policy failed to provide an exemption or accommodation to the plaintiff(s).

The Supreme Court's recent ruling in *Holt v. Hobbs,* 135 S.Ct. 853 (2015), which concerned a prison ban on inmates' growing beards, is another recent example of the more common RFRA claim.

The plaintiff in *Holt* sought to grow a beard in accordance with his Muslim faith. In *Holt*, like in *Hobby Lobby*, the government defendants insisted on a complete restriction and did not attempt to accommodate the plaintiff's religious exercise. The plaintiff in *Holt* proposed a compromise—he would be allowed to grow only a half-inch beard—which the prison refused. 135 S.Ct. at 861. The Court ultimately approved this compromise in its ruling. *Id.* at 867.

In the cases before us, by contrast, the Departments have developed a religious accommodation rather than leaving it for the courts to fashion judicial relief. Plaintiffs not only challenge a law that requires them to provide contraceptive coverage against their religious beliefs, they challenge the exception that the law affords to them. The precedents Plaintiffs cite are instructive in some respects, but none of them involve a situation where the government offers religious objectors an accommodation.[17] The Supreme Court and this

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[17] The accommodation adds an additional consideration that makes this unlike the typical RFRA case. In *Hobby Lobby*, *Yellowbear*, *Abdulhaseeb*, and *Holt*, the government either required or prohibited acts of religious significance to the plaintiffs. In the cases before us, the government has freed Plaintiffs from the responsibility to perform the act they consider religiously objectionable—namely, providing contraceptive coverage. Nonetheless, the Plaintiffs argue an act they do not consider objectionable in itself-completing a form or writing to HHS—becomes objectionable because it either causes the provision of contraceptive coverage or renders them complicit in the provision of contraceptive coverage. Therefore, unlike the aforementioned cases, we are in the slightly different position of considering whether an otherwise

circuit have suggested such accommodations might have eliminated or lessened burdens we otherwise deemed substantial. *See, e.g., Hobby Lobby,* 134 S.Ct. at 2759 (observing the accommodation scheme "constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty"); *Yellowbear,* 741 F.3d at 56 (underscoring that the case "isn't a situation where the claimant is left with some degree of choice in the matter and we have to inquire into the degree of the government's coercive influence on that choice"). Until now, however, we have not squarely considered a RFRA challenge to a religious accommodation.

The closest Tenth Circuit case we have found is *United States v. Friday,* 525 F.3d 938 (10th Cir.2008), in which defendant Winslow Friday argued his conviction for shooting a bald eagle without a permit violated RFRA because he shot the eagle for use in a tribal religious ceremony. The Bald and Golden Eagle Protection Act forbids killing a bald eagle, but an applicant can obtain a permit to "take" a live eagle for a religious ceremony. *See* 16 U.S.C. §§ 668, 668a. We recognized the potential question of "whether it substantially burdens Mr. Friday's religion to require him to obtain a permit in advance of taking an eagle."*Friday,* 525 F.3d at 947. We said we were "skeptical that the bare requirement of obtaining a permit can be regarded as a 'substantial burden' under RFRA,"*id.,* but Mr. Friday did not make that specific argument, and we

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unobjectionable act, understood in context, constitutes a substantial burden on Plaintiffs' religious exercise.

decided the permit accommodation otherwise met RFRA's strict scrutiny element, *id.* at 948.

We spoke favorably of the government's accommodation scheme in *Friday*, even though "[t]hat accommodation may be more burdensome than the [religious objectors] would prefer, and may sometimes subordinate their interests to other policies not of their choosing." *Id.* at 960. As we noted in conclusion: "Law accommodates religion; it cannot wholly exempt religion from the reach of the law." *Id.* We therefore turn to uncharted Tenth Circuit terrain.

* * * *

The Plaintiffs in the three cases before us assert claims against the Mandate and accommodation scheme under RFRA and the First Amendment's Free Exercise, Establishment, and Free Speech Clauses.[18] Because we determine the accommodation scheme relieves Plaintiffs from complying with the Mandate and does not substantially burden their religious exercise under RFRA or infringe upon their First Amendment rights, we affirm the district court's denial of a preliminary injunction to the plaintiffs in *Little Sisters* and reverse the district courts' grants of a preliminary injunction to the plaintiffs in *Southern Nazarene* and *Reaching Souls.*

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[18] We refer to "Plaintiffs" throughout the discussion, but in the First Amendment context, "Plaintiffs" refers only to the plaintiffs in *Little Sisters* and *Reaching Souls. See infra* note 51.

V. RFRA

Under RFRA, the government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."42 U.S.C. § 2000bb–1.

Plaintiffs argue the ACA and its implementing regulations violate RFRA because they substantially burden their religious exercise by forcing them to do one of three things: (a) comply with the Mandate and provide contraceptive coverage, (b) take advantage of the accommodation scheme, or (c) pay steep fines for non-compliance.[19] We conclude that the

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[19] The Government identifies a fourth option: by declining to sponsor a group health plan, Plaintiffs could avoid complying with the Mandate, using the accommodation, or paying the fines. The Government frames the Plaintiffs' provision of health insurance as an economic expenditure, and notes that regulations may make a business activity more expensive or onerous without violating the freedom of religion. *See Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 303–05 (1985); *Braunfeld v. Brown*, 366 U.S. 599, 605–06 (1961); *but see Hobby Lobby*, 134 S.Ct. at 2777. Plaintiffs respond that they consider the provision of health insurance a religious obligation, not merely an economic expenditure. Plaintiffs "believe they have a religious obligation to care for the employees who join in their ministry, and they cannot throw those people off their insurance policies without violating that obligation and harming their ministry."LS Reply Br. at 8.

Because we determine the accommodation scheme is not a substantial burden, we need not decide whether this fourth

accommodation scheme relieves Plaintiffs of complying with the Mandate or paying fines and does not impose a substantial burden on Plaintiffs' religious exercise for the purposes of RFRA.

To explain why the accommodation is permissible under RFRA, we first review the RFRA framework and consider how religious accommodations may lessen or eliminate the substantiality of a burden on religious exercise. We then apply this framework to the accommodation scheme before us, which exempts religious non-profits from providing contraceptive coverage and instead assigns that task to health insurance issuers and TPAs.

We conclude the accommodation does not substantially burden Plaintiffs' religious exercise. The accommodation relieves Plaintiffs from complying with the Mandate and guarantees they will not have to provide, pay for, or facilitate contraceptive coverage. Plaintiffs do not "trigger" or otherwise cause contraceptive coverage because federal law, not the act of opting out, entitles plan participants and beneficiaries to coverage. Although Plaintiffs allege the administrative tasks required to

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option constitutes a substantial burden on religious exercise—or, if it does, whether it survives strict scrutiny.

For similar reasons, we need not address the safe harbor provision detailed in the June 2013 regulations, which indicates organizations with self-insured group health plans that bring administration of their plans in-house and thereby do not use third-party administrators currently are not subject to enforcement of the contraceptive coverage requirement. 78 Fed.Reg. at 39,880–81.

opt out of the Mandate make them complicit in the overall delivery scheme, opting out instead relieves them from complicity. Furthermore, these *de minimis* administrative tasks do not substantially burden religious exercise for the purposes of RFRA.

The dissent parts ways with our majority opinion on the self-insured plaintiffs' RFRA claims. It stresses that, by opting out, the self-insured plaintiffs would cause the legal responsibility to provide contraceptive coverage to shift to their TPAs.[20] We agree. As we observe below, the regulations are clear on that point.[21] But shifting legal responsibility to provide coverage away from the plaintiffs relieves rather than burdens their religious exercise. The ACA and its implementing regulations entitle plan participants and beneficiaries to coverage whether or not the plaintiffs opt out. And the government has established a scheme where, if the law is followed, self-insured plaintiffs that opt out are relieved of providing, paying for, and facilitating coverage; the government assigns that responsibility to their TPAs; and plan participants and beneficiaries

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[20] Plaintiffs make causation the centerpiece of their RFRA claim. They allege that opting out of the Mandate would cause or make them complicit in providing contraceptive coverage, and thus substantially burdens their religious exercise. Much of our opinion assesses and ultimately rejects the merits of this claim.

[21] Indeed, this is an unremarkable feature of the accommodation scheme. An opt out religious accommodation typically contemplates that a non-objector will replace the religious objector and take over any legal responsibilities.

receive the coverage to which they are entitled by federal law. Such an arrangement is among the common and permissible methods of religious accommodation in a pluralist society, and does not constitute a substantial burden under RFRA.

A. *Legal Background*

1. Standard of Review

Each appeal before us seeks review of a district court order granting or denying a preliminary injunction. We review orders granting or denying a preliminary injunction for abuse of discretion. *See Hobby Lobby,* 723 F.3d at 1128; *Aid for Women v. Foulston,* 441 F.3d 1101, 1115 (10th Cir.2006).

A preliminary injunction may be granted if the party seeking it shows: "(1) a likelihood of success on the merits; (2) a likely threat of irreparable harm to the movant; (3) the harm alleged by the movant outweighs any harm to the non-moving party; and (4) an injunction is in the public interest."*Hobby Lobby,* 723 F.3d at 1128. A district court abuses its discretion by granting or denying a preliminary injunction based on an error of law. *See id.; Aid for Women,* 441 F.3d at 1115.

2. RFRA and Free Exercise

RFRA was enacted in 1993 in response to *Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990), in which the Supreme Court held that burdens on religious exercise are constitutional under the Free

Exercise Clause if they result from a neutral law of general application and have a rational basis. *Id.* at 878–80; *United States v. Hardman,* 297 F.3d 1116, 1126 (10th Cir.2002). Congress enacted RFRA to restore the pre-*Smith* standard, which permitted legal burdens on an individual's religious exercise only if the government could show a compelling need to apply the law to that person and that the law did so in the least restrictive way. *Smith,* 494 U.S. at 882–84; *see also Hobby Lobby,* 134 S.Ct. at 2792–93 (Ginsburg, J., dissenting). Congress specified the purpose of RFRA was to restore this compelling interest test as it had been recognized in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Wisconsin v. Yoder,* 406 U.S. 205 (1972).*See* 42 U.S.C. § 2000bb(b)(1).

By restoring the pre-*Smith* compelling interest standard, Congress did not express any intent to alter other aspects of Free Exercise jurisprudence. *See id.; Hobby Lobby,* 723 F.3d at 1133 ("Congress, through RFRA, intended to bring Free Exercise jurisprudence back to the test established before *Smith.*There is no indication Congress meant to alter any other aspect of pre-*Smith* jurisprudence. . . ."). Notably, pre-*Smith* jurisprudence allowed the government "wide latitude" to administer large administrative programs, and rejected the imposition of strict scrutiny in that context. As the Supreme Court indicated in *Bowen v. Roy,*

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government

> should not be put to the strict test applied by the District Court; that standard required the Government to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest.

476 U.S. 693, 707 (1986). As we discuss at greater length below, the pre-*Smith* standards restored by RFRA permitted the Government to impose *de minimis* administrative burdens on religious actors without running afoul of religious liberty guarantees.

3. Elements of RFRA Analysis

RFRA analysis follows a burden-shifting framework. "[A] plaintiff establishes a prima facie claim under RFRA by proving the following three elements: (1) a substantial burden imposed by the federal government on a(2) sincere (3) exercise of religion."*Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir.2001); *see*42 U.S.C. § 2000bb–1(a).[22] The burden then shifts to the government to demonstrate its law or policy advances "a compelling interest implemented through the least restrictive means

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[22] RFRA originally defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."In 1999, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") amended RFRA, and redefined "exercise of religion" by reference to 42 U.S.C. § 2000cc–5(7)(A).42 U.S.C. § 2000bb–2(4).Section 2000cc–5(7)(A) expanded the phrase to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."42 U.S.C. § 2000cc–5(7)(A); *see Kikumura*, 242 F.3d at 960.

available."*Hobby Lobby*, 723 F.3d at 1142–43. The government must show that the "compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened."*Id.* at 1126 (quotations and citation omitted)."This burden-shifting approach applies even at the preliminary injunction stage."*Id.*

We have previously stated "a government act imposes a 'substantial burden' on religious exercise if it: (1) requires participation in an activity prohibited by a sincerely held religious belief, (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief."*Hobby Lobby*, 723 F.3d at 1125–26 (quotations and alterations omitted); *see also Yellowbear*, 741 F.3d at 55 (applying this framework to RLUIPA); *Abdulhaseeb*, 600 F.3d at 1315 (same). As we discuss in the next section, whether a law substantially burdens religious exercise in one or more of these ways is a matter for courts—not plaintiffs—to decide.

4. Courts Determine Substantial Burden

To determine whether plaintiffs have made a prima facie RFRA claim, courts do not question "whether the petitioner . . . correctly perceived the commands of [his or her] faith."*Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981); *see Hobby Lobby*, 723 F.3d at 1138–40. But courts do determine whether a challenged law or policy

substantially burdens plaintiffs' religious exercise. RFRA's statutory text and religious liberty case law demonstrate that courts—not plaintiffs—must determine if a law or policy substantially burdens religious exercise.

RFRA states the federal government "shall not substantially burden a person's exercise of religion."42 U.S.C. § 2000bb–1(a). We must "give effect ... to every clause and word" of a statute when possible. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955). Drafts of RFRA prohibited the government from placing a "burden" on religious exercise. Congress added the word "substantially" before passage to clarify that only some burdens would violate the act. 139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statements of Sen. Kennedy and Sen. Hatch).

We therefore consider not only whether a law or policy burdens religious exercise, but whether that burden is substantial. If plaintiffs could assert and establish that a burden is "substantial" without any possibility of judicial scrutiny, the word "substantial" would become wholly devoid of independent meaning. *See Menasche*, 348 U.S. at 538–39. Furthermore, accepting any burden alleged by Plaintiffs as "substantial" would improperly conflate the determination that a religious belief is sincerely held with the determination that a law or policy substantially burdens religious exercise.

Every circuit that has addressed a RFRA challenge to the accommodation scheme at issue here has concluded that whether the government

has imposed a "substantial burden" is a legal determination. *See E. Tex. Baptist Univ. v. Burwell*, Nos. 14–20112, 14–10241, 14–40212, 14–10661, 2015 WL 3852811, at *3–5 & n .33 (5th Cir. June 22, 2015); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 612 (7th Cir.2015); *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 436 (3d Cir.2015); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 247–49 (D.C.Cir.2014); *Mich. Catholic Conf. & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 385 (6th Cir.2014), *vacated and remanded*, 135 S.Ct. 1914 (2015). This is consistent with our determination that we review *de novo* "what constitutes [a] substantial burden ... and the ultimate determination as to whether the RFRA has been violated." *United States v. Meyers*, 95 F.3d 1475, 1482 (10th Cir.1996); *see also Yellowbear*, 741 F.3d at 56 (determining "a reasonable finder of fact could conclude the prison has substantially burdened Mr. Yellowbear's religious exercise"). Thus, we "accept [ ] as true the factual allegations that [Plaintiffs'] beliefs are sincere and of a religious nature—but not the legal conclusion, cast as a factual allegation, that [their] religious exercise is substantially burdened." *Kaemmerling v. Lappin*, 553 F.3d 669, 679 (D.C.Cir.2008); *see Mahoney v. Doe*, 642 F.3d at 1112, 1121 (D.C.Cir.2011); *Henderson v. Kennedy*, 253 F.3d 12, 17 (D.C.Cir.2001).[23]

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[23] Plaintiffs cite *Thomas* to argue we must accept their belief that they cannot participate in the accommodation whether or not that belief is "acceptable, logical, consistent, or comprehensible." LS Br. at 47; RS Br. at 39 (quoting *Thomas*,

We have cautioned that substantiality does not permit us to scrutinize the "theological merit" of a plaintiff's religious beliefs—instead, we analyze "the intensity of the coercion applied by the government to act contrary to those beliefs."*Hobby Lobby*, 723 F.3d at 1137 (emphasis omitted). "Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."*Id.*[24] In determining whether a law or policy applies substantial pressure on a claimant to violate his or her beliefs, we consider how the law or policy being challenged actually operates and affects religious exercise. *See Geneva Coll.*, 778 F.3d at 436 ("We may consider the nature of the action required of the appellees, the connection between that action and the appellees' beliefs, and the extent to which that action interferes with or otherwise affects the

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450 U.S. at 714).*Thomas* concerned the denial of unemployment benefits to a claimant who quit his job because his religious beliefs prohibited him from producing armaments to be used for war. *Thomas* prevents courts from scrutinizing the theological merit of a plaintiff's sincere religious belief, but not from assessing whether a challenged law or policy amounts to a substantial burden on religious exercise. *See Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. We do, however, have doubts whether the alleged burden imposed by the deduction disallowance on the Scientologists' practices is a substantial one."(citing *Thomas*, 450 U.S. at 716)).

[24] The Government does not dispute the sincerity of Plaintiffs' religious beliefs. *See Little Sisters*, 6 F.Supp.3d at 1237; *Southern Nazarene*, 2013 WL 6804265, at *5; *Reaching Souls*,2013 WL 6804259, at *4.

appellees' exercise of religion—all without delving into the appellees' beliefs."); *see also*139 Cong. Rec. S14352 (daily ed. Oct. 26, 1993) (statement of Sen. Kennedy) (observing that RFRA would not impose strict scrutiny for "governmental actions that have an incidental effect on religious institutions").

When evaluating RFRA claims, we have therefore recognized that not all burdens alleged by plaintiffs amount to substantial burdens. *See Abdulhaseeb,* 600 F.3d at 1321 ("We are not willing to conclude, however, that every single presentation of a meal an inmate considers impermissible constitutes a substantial burden on an inmate's religious exercise."); *Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 654 (10th Cir.2006) ("[W]e are not persuaded by Grace United's assertion that the Board's denial of a zoning variance for its proposed daycare operation constitutes more than an incidental burden on religious conduct."); *Kikumura,* 242 F.3d at 961 (requiring evidentiary proof from the plaintiff that an alleged burden was "substantial" and remanding to the district court). Furthermore, as we discuss in the following section, the existence of an accommodation may affect whether a law or policy burdens religious exercise and whether that burden is substantial.

5. Accommodations Can Lessen or Eliminate Burden

We finally note that accommodations function to lessen or eliminate the burden of a generally applicable law. In *Hobby Lobby,* this court said the

stark choice between providing contraceptive coverage and paying steep fines constitutes a sufficiently substantial burden to warrant relief under RFRA.*Hobby Lobby*, 723 F.3d 1114. Religious objectors are not always put to such a stark choice. When, as here, plaintiffs are offered an accommodation to a law or policy that would otherwise constitute a substantial burden, we must analyze whether the accommodation renders the potential burden on religious exercise insubstantial or nonexistent such that the law or policy that includes the accommodation satisfies RFRA.

Accommodations may eliminate burdens on religious exercise or reduce those burdens to *de minimis* acts of administrative compliance that are not substantial for RFRA purposes. The Supreme Court recognized this point in *Hobby Lobby* when it suggested an accommodation to exempt the plaintiff corporations from complying with the Mandate could satisfy RFRA concerns. *Hobby Lobby*, 134 S.Ct. at 2782 ("At a minimum, [the accommodation] does not impinge on the plaintiffs' religious belief that providing insurance coverage for the contraceptives at issue here violates their religion, and it serves HHS's stated interests equally well."); *see also id.* at 2786–87 (Kennedy, J., concurring). The D.C. Circuit observed that "[a] burden does not rise to the level of being substantial when it places an inconsequential or *de minimis* burden on an adherent's religious exercise."*Priests for Life*, 772 F.3d at 246 (quotations, citations, and alterations omitted). Were it otherwise, our substantial burden inquiry would become a blunt tool incapable of recognizing the meaningful difference between forcing organizations

to provide or pay for contraceptives and allowing them to opt out of that requirement. To determine whether the accommodation scheme in these cases renders the alleged burden on Plaintiffs' religious exercise nonexistent or insubstantial, we turn to the merits of Plaintiffs' RFRA arguments.

B. Substantial Burden Analysis

1. Plaintiffs' RFRA Arguments

The cases before us turn on whether complying with the accommodation constitutes a substantial burden. The Government does not dispute the sincerity of Plaintiffs' religious belief that they may not provide, pay for, or facilitate contraceptive coverage. The parties dispute whether the accommodation scheme substantially burdens the Plaintiffs' exercise of religion.

Plaintiffs oppose completing the Form or notifying HHS because they believe they are being asked to play a causal role in the delivery of contraceptive coverage and would be complicit or perceived to be complicit in the overall contraceptive delivery scheme by virtue of their opting out. They also allege their continuing involvement in the regulatory scheme is a substantial burden.[25]

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[25] The *Little Sisters* and *Reaching Souls* plaintiffs clarify that they "have never objected to merely identifying themselves so that the government can leave them alone."LS Supp. Br. II at 2 n.2; RS Supp. Br. II at 2 n.2. They have expressed satisfaction with the Supreme Court's injunctions pending appeal in *Little Sisters* and *Wheaton College*.LS Supp. Br. II at

The Government responds that completing the Form or notification does not involve Plaintiffs in the delivery of contraceptive coverage. The accommodation relieves Plaintiffs of their obligations under the Mandate, and when that occurs, federal law authorizes and obligates a health insurance issuer or TPA to provide or arrange for the delivery of contraceptive coverage to plan participants and beneficiaries who are entitled to that coverage under the ACA. The Government therefore argues the accommodation does not substantially burden Plaintiffs' religious exercise as a matter of law.

1–2; RS Supp. Br. II at 2, 12; Oral Arg. in LS at 12:10–12:40. They nevertheless object to the recent modified accommodation promulgated by the Departments—the opt out letter to HHS—both because the self-certification requires more information about their group health plan than the aforementioned notice the Supreme Court proposed, and because of the "collateral consequences" that follow after they opt out. Oral Arg. in LS at 12:10–13:53.

The *Little Sisters* and *Reaching Souls* plaintiffs have not convincingly explained how the notice to HHS promulgated by the Departments would substantially burden their religious exercise but the notice crafted by the Supreme Court does not. In *Wheaton College*, the Supreme Court emphasized the plaintiffs had functionally notified the Departments they met the necessary requirements to obtain an accommodation, and said "[n]othing in this order precludes the Government from relying on this notice, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act."134 S.Ct. at 2807; *see also Zubik*, 2015 WL 3947586.

The *Southern Nazarene* plaintiffs object to affirmatively voicing a religious objection, including the type of notice described in *Wheaton College*.*See* Oral Arg. in SN at 24:30–25:20. They appear to believe that exemption from the Mandate—like the exemption for religious employers—is the only proper result under RFRA.

2. The Accommodation Scheme Eliminates Burdens on Religious Exercise

Under the accommodation scheme, the act of opting out relieves objecting religious non-profit organizations from complying with the Mandate and excuses them from participating in the provision of contraceptive coverage. The Departments designed the accommodation so that, upon receipt of the Form or a notification from the government, health insurance issuers and TPAs—not the objecting religious non-profit organization-provide contraceptive coverage and ensure the organization will not be required to provide, pay for, or otherwise facilitate that coverage. *See Mich. Catholic Conf.*, 755 F.3d at 391. We review this feature of the accommodation scheme to show how it eliminates burdens Plaintiffs otherwise would face, similar to the burdens the for-profit plaintiffs faced in *Hobby Lobby*.

First, the regulations specify a health insurance issuer must handle contraceptive coverage separately from the insurance provided under the religious non-profit organization's plan.

> A group health insurance issuer that receives a copy of the self-certification or notification ... must (A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and (B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and

> beneficiaries for so long as they remain enrolled in the plan.

45 C.F.R. § 147.131(c)(2)(i).[26]

Second, after a religious non-profit organization opts out, a health insurance issuer may not share the costs of providing contraception with the employer or employees.

> With respect to payments for contraceptive services, the [health insurance] issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services.

45 C.F.R. § 147.131(c)(2)(ii); *see also*26 C.F.R. § 54.9815–2713A(c)(2)(ii); 29 C.F.R. § 2590.715–2713A(c)(2)(ii). TPAs are subject to similar requirements. *See*26 C.F.R. § 54.9815–2713AT(b)(2); 29 C.F.R. § 2590.715–2713A(b)(2).

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[26] TPAs are not subject to this provision. Instead, a TPA that receives the Form or a notification from the government must provide or arrange for contraceptive coverage for plan participants and beneficiaries if it wishes to remain the TPA for the group health plan. *See*26 C.F.R. § 54.9815–2713AT(b)(2); 29 C.F.R. § 2590.715–2713A(b)(2).

Finally, a health insurance issuer or TPA must, in communicating with plan participants or beneficiaries, send separate notice regarding contraceptive coverage from other plan notifications and make clear the employer neither administers nor funds contraceptive benefits. A health insurance issuer or TPA

> must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

26 C.F.R. § 54.9815–2713A(d); 29 C.F.R. § 2590.715–2713A(d); *see also*45 C.F.R. § 147.131(d).

All of the foregoing remove the objecting religious non-profit organizations from providing contraceptive coverage, but Plaintiffs argue these protections of their religious liberty are insufficient because they still must deliver a Form or notify HHS to opt out of the Mandate. They contend this act

substantially burdens their religious exercise because it "triggers" the provision of contraceptive coverage, makes them complicit in the larger delivery scheme, and demands their ongoing involvement. We disagree. The accommodation relieves Plaintiffs of their statutory obligation to provide contraceptive coverage to their plan participants and beneficiaries, and as we discuss below, taking advantage of that accommodation is not a substantial burden on religious exercise.

3. The Accommodation Scheme Does Not Impose a Substantial Burden

To explain why the accommodation scheme does not substantially burden Plaintiffs' religious exercise, we look at the theories argued by the Plaintiffs and why they fail.

a. Opting out does not cause contraceptive coverage.

Although the accommodation scheme frees Plaintiffs from providing, paying for, or facilitating contraceptive coverage, they contend that, by delivering the Form or notifying HHS, they nevertheless "trigger" or cause contraceptive coverage. They do not. As we explain below, Plaintiffs' causation argument misconstrues the statutory and regulatory framework. Federal law, not the Form or notification to HHS, provides for contraceptive coverage without cost sharing to plan participants and beneficiaries. Because the mechanics of the accommodation scheme differ slightly for different types of plans, we examine how

the regulations work for insured plans, self-insured plans, and self-insured church plans. But in each circumstance, Plaintiffs' causation argument fails to establish any burden on Plaintiffs' religious exercise.

i. Insured Plans

The plaintiffs with insured plans deal directly with a health insurance issuer and do not use a TPA.[27] They argue the accommodation scheme levies a substantial burden on their religious exercise because "insurance issuers will sell [them] plans that either (a) *expressly* include abortifacients; or (b) *functionally* include abortifacients by guaranteeing separate payments for them upon [their] execution and conveyance of the self-certification to the issuer."SN Br. at 18. We disagree.

The regulations do not burden the religious exercise of employers using insured plans. The ACA obligates both group health plans and health insurance issuers to provide contraceptive coverage. A religious non-profit organization may comply with the Mandate and provide coverage to its employees, opt out using the accommodation, or not comply with the law and pay fines. But in each instance, the health insurance issuer must ensure the organization's employees receive contraceptive coverage.

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[27] The plaintiffs with insured plans are Oklahoma Wesleyan University and Oklahoma Baptist University. Southern Nazarene also has an insured plan for students and claims above $100,000.

By delivering the Form or notifying HHS, an organization with an insured plan does not enable coverage—to the contrary, it simply notifies its health insurance issuer the organization will not be providing coverage. The health insurance issuer then has an independent and exclusive obligation to provide that coverage without cost sharing. The relevant regulation states: "When a self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 147.130."45 C.F.R. § 147.131(c)(1)(i). Because the ACA obligates health insurance issuers to provide contraceptive coverage, they must meet this obligation independently and irrespective of the notification. The self-certification does not impose any responsibility; it merely makes it the issuer's *sole* responsibility rather than one shared with the group health plan itself.

Because federal law requires the health insurance issuer to provide coverage and the accommodation process removes an objecting organization from participating, plaintiffs with insured plans fail to show the accommodation burdens their religious exercise. The insured plaintiffs are not burdened when they are relieved of their responsibility and their insurers provide coverage as required by independent obligations set out in the ACA.

ii. Self–Insured Plans

The accommodation scheme permits religious non-profit organizations with self-insured plans to opt out by delivering the Form to their TPA or

notifying HHS that they have a religious objection and will not comply with the Mandate. When the objecting organization opts out, the TPA that administers its group health plan is responsible for providing contraceptive coverage if it wishes to remain a TPA for the plan. In this section, we address this self-insured arrangement. In the next section, we consider the subset of self-insured plaintiffs having church plans over which the government lacks enforcement authority under ERISA to compel the TPA to comply with its legal obligations.

1) Plaintiffs' argument

The only plaintiff with a self-insured plan subject to ERISA is Southern Nazarene. Southern Nazarene argues the accommodation scheme substantially burdens its religious exercise because the scheme requires it to "comply with the Mandate by either (a) setting up a self-insured plan that includes abortifacients; or (b) setting up a self-insured plan that functionally includes abortifacients by guaranteeing separate payments for them by the TPA upon the entity's execution of the self-certification."SN Br. at 18. Self-insured plaintiffs with ERISA-exempt church plans make similar claims.

Plaintiffs and the dissent emphasize that the TPA may arrange or provide coverage only after a religious non-profit organization opts out.[28] We

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[28] In *University of Notre Dame*, Judge Posner said: "By refusing to fill out the form Notre Dame would subject itself to

consider this to be an uncontested and unremarkable feature of the accommodation scheme.[29] The regulations state that when a religious non-profit organization opts out of providing contraceptive coverage, the TPA is notified that the organization will not administer or pay for contraceptive coverage, and that it must provide or arrange for contraceptive coverage without cost sharing if it wishes to continue administering the plan. 26 C.F.R. § 54.9815–2713AT(b)(2); 29 C.F.R. § 2590.715–2713A(b)(2). The TPA is authorized and obligated to provide the coverage guaranteed by the ACA only if the religious non-profit organization that has primary responsibility for contraceptive coverage opts out of providing it.

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penalties, but Aetna and Meritain would still be required to provide the services to the university's students and employees." *Univ. of Notre Dame*, 786 F.3d at 614.

We understand the mechanics of the accommodation to work differently. Aetna, as a health insurance issuer for Notre Dame's students, would be obligated to provide contraceptive coverage under the ACA whether or not Notre Dame delivered the Form or notification to HHS. *See* 42 U.S.C. § 300gg–13. Meritain, a TPA, would be obligated to provide contraceptive coverage only after Notre Dame delivered the Form or notification to HHS and opted out of the Mandate. *See* 26 C.F.R. § 54.9815–2713AT(b)(2); 29 C.F.R. § 2590.715–2713A(b)(2).

[29] Even the dissent in *Wheaton College* recognized that a TPA need only provide the legally required contraceptive coverage when a religious non-profit organization takes advantage of the accommodation scheme. As Justice Sotomayor observed, "a third-party administrator bears the legal obligation to provide contraceptive coverage only upon receipt of a valid self-certification." *Wheaton Coll.*, 134 S.Ct. at 2814 n. 6 (Sotomayor, J., dissenting from grant of injunction pending appeal).

Plaintiffs suggest this shift in legal responsibility for contraceptive coverage substantially burdens their religious exercise under RFRA. They argue their opting out would trigger, cause, or offer a "permission slip" for the delivery of contraception by allowing their TPA to provide the coverage.*Southern Nazarene*, 2013 WL 6804265, at *8. We disagree.

2) Opting out does not cause coverage

The ACA requires all group health plans to cover preventive services, including contraception, without cost sharing. Because a group health plan must include contraceptive coverage under the ACA, the accommodation scheme requires a TPA that administers a self-insured religious non-profit organization's group health plan to provide coverage if the organization opts out. The TPA must then arrange coverage for plan participants and beneficiaries if it wishes to continue functioning as the TPA for the objecting organization. This arrangement allows religious non-profit organizations to opt out and ensures plan participants and beneficiaries will receive the contraceptive coverage to which they are entitled by law.

Under this framework, the plaintiffs' argument does not identify a substantial burden on religious exercise. The opt out does not "cause" contraceptive coverage; it relieves objectors of their coverage responsibility, at which point federal law shifts that responsibility to a different actor. The ACA and its implementing regulations have already required

that group health plans will include contraceptive coverage and have assigned legal responsibilities to ensure such coverage will be provided when the religious non-profit organization opts out. *See Wheaton College v. Burwell*, No. 14–2396, 2015 WL 3988356, at *4 (7th Cir. July 1, 2015); *E. Tex. Baptist Univ.*, 2015 WL 3852811, at *5–6; *Univ. of Notre Dame*, 786 F.3d at 613–14; *Geneva Coll.*, 778 F.3d at 437–38; *Priests for Life*, 772 F.3d at 254–55.[30] This arrangement is typical of religious objection accommodations that shift responsibility to non-objecting entities only after an objector declines to perform a task on religious grounds.[31] Although a

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[30] To the extent Plaintiffs are specifically concerned about the language on the Form, that concern can be alleviated by taking advantage of the expanded accommodation and notifying HHS in writing. Plaintiffs need not use any terms they consider morally charged, like "certify," in their letter or email to HHS.

We further note the notification to HHS requires self-insured plaintiffs only to register their objection and identify their TPA—it does not require them to inform their TPA of any legal responsibilities to provide contraceptive coverage. When the opt out is submitted to HHS, the plaintiffs are relieved of their responsibilities. The government then takes steps to ensure that coverage is provided—HHS notifies the Department of Labor of the objection, and the Department of Labor then contacts the TPA to inform it of its duties under the ACA.

[31] Analogizing the opt out to conscientious objections to war, *see, e.g.*, *Priests for Life*, 772 F.3d at 245–46; *Univ. of Notre Dame*, 786 F.3d at 623–24 (Hamilton, J., concurring), should not overshadow the diverse array of mechanisms that federal, state, and local governments have used to accommodate objectors. Many religious objection schemes require an affirmative opt out before another person is required to step in and assume responsibility, and may require the objector to

religious non-profit organization may opt out from providing contraceptive coverage, it cannot preclude the government from requiring others to provide the legally required coverage in its stead.[32] In short, the

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identify a replacement in the process. *See, e.g.*, 2015 Utah Laws Ch. 46 (accommodating religious objections to same-sex marriage of those working in county clerks' offices by requiring that "[a] county clerk shall ... establish policies to ensure that the county clerk, or a designee of the county clerk who is willing, is available during business hours to solemnize a legal marriage for which a marriage license has been issued"); *Stormans Inc. v. Selecky*, 844 F.Supp.2d 1172 (W.D.Wash. Feb.22, 2012) (reinstating a "refuse and refer" approach where pharmacies need not provide contraception so long as they refer patients to alternative providers); Conn. Agencies Regs. § 19a–580d–9 (requiring health care providers who object to implementing a do-not-resuscitate order to "turn over care of the patient without delay to another provider who will implement the DNR order"); Internal Revenue Service, Tax Guide for Churches & Religious Organizations 18 (2013), www.irs.gov/pub/irs-pdf/p1828.pdf (explaining that a church may opt out of paying Social Security and Medicare taxes for religious reasons, shifting that responsibility to their employees to pay those taxes as though they were self-employed).

[32] Plaintiffs argue that, under the accommodation scheme, organizations with self-insured plans participate in the delivery of contraceptive coverage because their TPAs cannot arrange for that coverage unless and until plaintiffs deliver the Form or notification to HHS. We discuss above why this characterization of the accommodation scheme is incorrect, but we note here that this concern is specific to self-insured plans subject to ERISA. Plaintiffs could avoid the situation they deem objectionable by employing an insured plan, employing a self-insured church plan where the Departments lack authority to enforce the Mandate against their TPA, or administering the self-insured plan on their own in-house without using a TPA. Although the dissent notes that in-house administration is complex, Dissent at 22–23, Plaintiffs have not demonstrated it

framework established by federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will receive contraceptive coverage.[33]

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would be a substantial burden under RFRA. The fact that this alternative may be more expensive or difficult for plaintiffs does not necessarily make it a substantial burden. *See Braunfeld*, 366 U.S. at 605–06.

[33] In this regard, the accommodation scheme here is comparable to a conscientious objector accommodation scheme, which provides for someone to replace the objector when he opts out of military service. *See Priests for Life*, 772 F.3d at 245–46; *see also Univ. of Notre Dame*, 786 F.3d at 623–24 (Hamilton, J., concurring). Indeed, the conscientious objector scheme is administratively more burdensome than filing the Form or notifying HHS to opt out of the Mandate. A conscientious objector must register in the Selective Service System before being able to apply for an exemption, must complete an application and appear for an in-person interview, and, if the exemption is granted, must perform two years of service for the government in lieu of military service. *See*50 U.S.C. § 456j.

The dissent points to differences between the religious accommodation here and the conscientious objector scheme. But the comparison is apt. Courts have recognized that, to opt out of military service for religious reasons, a conscientious objector must notify the government of his objection knowing that someone else will take his place.*See Trans World Airlines v. Hardison*, 432 U.S. 63, 96 n. 13 (1977) (Marshall, J., dissenting) (recognizing that "the effect of excusing conscientious objectors from military conscription is to require a nonobjector to serve instead, yet we have repeatedly upheld this exemption"); *Sheridan v. United States*, 483 F.2d 169, 174 (8th Cir.1973) (acknowledging that when the plaintiff evaded induction, "another person had to be called in his place"); *McKenzie v. Schuppener*, 415 F.2d 1056, 1058 (5th Cir.1969) (characterizing a conscientious objection application as "the

3) Response to dissent

The dissent argues that our reasoning fails to appreciate the difference between insured and self-insured plans. With insured plans, the health insurance issuer bears legal responsibility to provide contraceptive coverage whether or not the religious non-profit has opted out. With self-insured plans, the

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situation where appellant must go to Vietnam or someone else go in his place"). Similarly, to opt out of the Mandate, the self-insured religious objector must notify the government knowing that a TPA will take its place.

And historically, it is not unprecedented to require an objector to identify a substitute for military service. To the contrary, the first federal draft statute permitted a draftee to avoid service only by either providing a substitute or paying $300. *See* Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863). As the dissent observes, the Civil War Enrollment Act sparked riots, Dissent at 14–15 n.7, but these were triggered by opposition to the draft itself, the inability of working class people to pay the $300 exemption, and anxiety about freed slaves entering the labor market after the war—not the fact that the draft law allowed draftees to name a substitute in their place. *See* Leslie M. Harris, In the Shadow of Slavery: African Americans in New York City, 1626–1863, at 279–88 (2003). Although Congress later eliminated the $300 commutation fee (except for conscientious objectors), it retained the provision allowing enrollees to supply a substitute. *See* Act of July 4, 1864, ch. 237, §§ 2, 10, 11, 13 Stat. 379, 379–80 (1864). To the extent the dissent suggests Chief Justice Taney's thoughts on the topic are relevant, Dissent at 14–15 n.7, we note that he considered conscription itself unconstitutional, not the substitution provision. *See* Leon Friedman, *Conscription and the Constitution: The Original Understanding*, 67 Mich. L.Rev. 1493, 1546–48 (1969). In fact, Chief Justice Taney paid $100 to excuse his "body servant" from the draft. *See* Bernard C. Steiner, Life of Roger Brooke Taney: Chief Justice of the United States Supreme Court 511–12 (1922).

TPA shoulders legal responsibility for coverage only after the religious non-profit has opted out.

We agree this is a distinction between these types of plans, but the dissent overplays its importance. *See* Dissent at 5 (deeming the difference between insured and self-insured plans "the critical distinction").[34] In both contexts, the ACA requires that group health plans cover contraceptive services, and a plaintiff knows coverage will be provided when it opts out. Plaintiffs do not dispute plan participants and beneficiaries' right to contraceptive coverage, nor do they contest the government's ability to require TPAs and health insurance issuers to arrange for such coverage when a religious nonprofit organization opts out. The only question before us is whether the plaintiffs are substantially burdened when they notify the government of their objection with the knowledge that another party will be required to provide coverage in their stead. The answer is no.

A religious accommodation tries to reconcile religious liberty with the rule of law. When faced with an unavoidable conflict between following the

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[34] Although the Mandate in the insured plan context assigns responsibility to provide contraceptive coverage to both the religious non-profit organization and its health insurance issuer, we do not believe this is the only permissible arrangement to permit religious accommodation. Requiring all accommodations to follow this model would be duplicative, costly, and impractical, and would foreclose a wide range of pragmatic arrangements that bring in substitutes when and only when a religious objector opts out of performing a task. *See, e.g., supra* note 31.

law or religious belief, RFRA provides a religious objector a means to challenge a generally applicable law and seek an exception to avoid following that law without having to break it. A statutory accommodation, as we have here, serves the same purpose. As noted above, this case is unusual because the Plaintiffs do not seek an accommodation where none exists, but instead challenge a statutory accommodation and argue that the process for seeking refuge in it substantially burdens their religious exercise. As to the self-insured plaintiffs, the dissent contends that if they opt out and transfer their duty to provide contraceptive coverage to the TPA, they necessarily cause such coverage. We disagree.

By opting out, the self-insured plaintiffs shift their duty to provide coverage to a TPA, but they do not change their plan participants and beneficiaries' entitlement to contraceptive coverage under federal law.[35] The dissent suggests, however, that because

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[35] The dissent attempts to distinguish between health plan beneficiaries' entitlement to coverage and their actual receipt of coverage. This distinction breaks down under inspection. If a religious non-profit complies with the law by providing coverage, the beneficiaries are entitled to and receive coverage. If the non-profit opts out as the law allows, the beneficiaries likewise are entitled to and receive coverage, they just do not receive it from the non-profit. Only if the non-profit disobeys the law and refuses either to provide coverage or opt out would the beneficiaries not receive coverage (though they would still be entitled to it). If the opt out were not part of the law, the plaintiffs would be in the same position as the for-profits in *Hobby Lobby*—without a legal option to avoid providing coverage. But the accommodation scheme gives the plaintiffs a

the plaintiffs can stymie coverage to their employees by breaking the law and incurring fines, and because opting out ultimately results in the TPAs' providing coverage, the plaintiffs' opting out therefore would cause contraceptive coverage. But this misconstrues the purpose of religious accommodation: to permit the religious objector both to avoid a religious burden and to comply with the law. If the plaintiffs wish to avail themselves of a legal means—an accommodation—to be excused from compliance with a law, they cannot rely on the possibility of their violating that very same law to challenge the accommodation.

In making this argument, the dissent focuses almost exclusively on whether the plaintiffs' opt out is a but-for cause of the TPAs' authority to provide contraceptive coverage.[36]It does, but this approach

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legal avenue to avoid providing coverage as opposed to non-compliance with the law with the attendant financial penalties.

[36] Plaintiffs and the dissent characterize the self-certification as giving the TPA "permission" to provide contraceptive coverage. Dissent at 9. This characterization ignores that the self-certification specifically registers an objection to providing coverage, relieves the plaintiffs of their obligation to provide it, and affirmatively distances the plaintiffs in numerous ways from providing coverage to plan participants and beneficiaries. *See supra* Section V.B.2. Equating the opt out to a permission slip is akin to "disregard[ing] the difference between a 'No Trespassing' sign and a welcome mat."*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 245 (1995) (Stevens, J., dissenting). The government is not compelling the plaintiffs to endorse or license something they consider objectionable; instead, the government is allowing them to decline a legal responsibility while requiring another party to perform it in their stead.

misses the mark. Although opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage, that is the point of an accommodation—shifting a responsibility from an objector to a non-objector. That is how a legislative policy choice—here, to afford women contraceptive coverage—can be reconciled with religious objections to that policy. We do not "den[y] the existence of any causation."Dissent at 10. We instead correctly identify the effect of opting out. The effect is to shift legal responsibility from the self-insured plaintiff to its TPA and relieve the plaintiff of the duty it considers objectionable. The effect is not the provision of contraceptive coverage, which would be afforded under the law whether or not the plaintiff opts out.

The ACA requires that either the religious non-profit organization or the TPA must provide contraceptive coverage for a self-insured group health plan, and the accommodation must be evaluated with that provision in mind. The scheme allows the religious non-profit organization to opt out of the responsibility of providing coverage and assigns that duty to the TPA administering the group health plan. Crucially, it does not change or expand contraceptive coverage beyond what federal law has already guaranteed. As the Supreme Court said in *Hobby Lobby,* the effect of the accommodation on employees "would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing." 134 S.Ct. at 2760.

The government has designed the accommodation so plaintiffs that opt out are freed from providing, paying for, or facilitating contraception, and the TPA's responsibility to provide coverage in their stead stems from federal law. Because this arrangement does not substantially burden the plaintiffs when they comply with the law, it does not matter whether the plaintiffs could prevent plan participants and beneficiaries from receiving coverage by violating the law. The dissent seems to suggest the ACA and its implementing regulations give self-insured plaintiffs discretion to decide whether their employees receive contraceptive coverage. The ACA and its implementing regulations do not, and the plaintiffs do not contend that they do. To the contrary, federal law generally requires that all people must have health insurance and that all health insurance must include preventive services, including contraceptive coverage. *See*42 U.S.C. § 300gg–13.[37] And "although [the ACA] does not specifically mention third-party administrators, they administer 'group health plans,' which must include coverage. Nothing suggests the insurers' or third-party administrators' obligations would be waived if the plaintiffs refused to apply for the accommodation."*E. Tex. Baptist Univ.*, 2015 WL 3852811, at *5 (alterations omitted). The accommodation scheme does not give plaintiffs

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[37] The dissent asks, "if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries?"Dissent at 8. The answer is the self-insured plaintiffs, if they comply with the law. But this is the reason for the opt out: to allow the plaintiffs a legal means to avoid providing coverage.

discretion to thwart their employees' right to contraceptive coverage by refusing to provide coverage and also refusing to register their objection so the government can make alternative arrangements to free them from providing coverage.[38] Because Congress has created a federal entitlement to contraceptive coverage and formulated a framework to guarantee that coverage will be provided even if plaintiffs decline to provide it, self-insured plaintiffs do not "cause" contraceptive coverage by exercising their ability to opt out.

4) No cause of substantial burden

In sum, the self-insured plaintiffs' causal analysis falters regarding the effect of opting out, which is to shift legal responsibility to provide contraceptive coverage from plaintiffs to their TPAs. When the government establishes a scheme that anticipates religious concerns by allowing objectors to opt out but ensuring that others will take up their responsibilities, plaintiffs are not substantially burdened merely because their decision to opt out cannot prevent the responsibility from being met.

To establish a claim under RFRA, about which the dissent says little, a plaintiff must show the government substantially burdens its sincere religious exercise. The ACA states group health plans must cover contraception, and the regulations

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[38] In the absence of any such discretionary power or responsibility, plaintiffs are not faced with the Hobson's choice the dissent describes. Dissent at 7–8, 12, 23. To the contrary, the accommodation eliminates any Hobson's choice by allowing plaintiffs to opt out of providing coverage.

state that if a religious non-profit organization opts out, that coverage will be provided by a TPA. Opting out does not cause the coverage itself; federal law does, by establishing a scheme that permits plaintiffs to opt out of their legal responsibility while simultaneously ensuring that plan participants and beneficiaries receive the coverage to which they are legally entitled. Allowing plaintiffs to opt out is not a substantial burden under RFRA.[39]

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[39] The dissent's theory of causation is not viable for the reasons discussed above. We also fail to see how it comports with the Supreme Court's orders in *Wheaton College*, 134 S.Ct. 2806, and *Zubik*, 2015 WL 3947586. In Part II.B.1, the dissent objects that "a third party's legal authority (*i.e.* permission) to provide the coverage is wholly dependent upon (*i.e.* caused by) the self-insured non-profit opting out."Dissent at 9. But that would be equally true of the arrangement proposed in the Supreme Court's orders in *Zubik*, which enjoined the Mandate only "[i]f the applicants ensure that the Secretary of Health and Human Services is in possession of all information necessary to verify applicants' eligibility under 26 CFR § 54.9815–2713A(a) or 29 CFR § 2590.715–2713A(a) or 45 CFR § 147.131(b) (as applicable),"2015 WL 3947586, at *1, and *Wheaton College*, which enjoined the Mandate only "[i]f the applicant informs the Secretary of Health and Human Services in writing that it is a nonprofit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services,"134 S.Ct. at 2807. (The plaintiffs in *Zubik* are self-insured and use TPAs. *See Geneva College*, 778 F.3d at 433. Wheaton College employs various insurance arrangements, but uses a TPA to deliver a portion of its coverage-specifically, its prescription drug coverage. *See Wheaton College v. Burwell*, 50 F.Supp.3d. 939, 944 (N.D.Ill.2014).) Wheaton College had already submitted a notice of its objection to the government, but the Supreme Court did not limit the injunction to that factual scenario. As Justice Sotomayor observed, "because Wheaton is materially

iii. *Self-Insured Church Plans*

The foregoing analysis of self-insured plans applies to the subset of self-insured church plans. We address additional reasons here to reject the church plan plaintiffs' RFRA claims.

The plaintiffs with self-insured church plans are in a unique position.[40] A TPA cannot be compelled to provide or arrange for contraceptive coverage if it administers a church plan under 26 U.S.C. § 414(e) that has not elected to comply with provisions of ERISA under 26 U.S.C. § 410(d)—which describes the self-insured church plans in the cases before us. The Departments concede they lack authority under ERISA to force these church plan TPAs to perform their regulatory responsibility. *See* 29 U.S.C. § 1003(b)(2). As a result, the Government can require the plaintiffs with self-insured church plans to use the Form or notify HHS to register their objection and opt out, but it has no enforcement authority to compel or penalize those plaintiffs' TPAs if they

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indistinguishable from other nonprofits that object to the Government's accommodation, the issuance of an injunction in this case will presumably entitle hundreds or thousands of other objectors to the same remedy."*Wheaton College*, 134 S.Ct. at 2814 n. 6 (Sotomayor, J., dissenting).

[40] The plaintiffs with self-insured church plans include the Little Sisters, Reaching Souls, Truett–McConnell, and Mid–America Christian. The analysis in this section also applies to the plaintiffs that operate or administer self-insured church plans, which include the Christian Brothers Employee Benefit Trust, Christian Brothers Services, and GuideStone Financial Resources.

decline to provide or arrange for contraceptive coverage.[41]

The lack of enforcement authority makes any burden on plaintiffs with church plans even less substantial than the burden on plaintiffs with self-insured plans that are subject to ERISA. Nonetheless, plaintiffs with church plans offer the following arguments as to why the accommodation scheme might still burden their religious exercise. First, the Departments could decide to alter the regulations and assert authority over church plans under ERISA. Second, the mere act of signing the Form or delivering the notification may involve them in the provision of contraception, either by cooperating with the Departments or by providing authorization to a TPA, which then decides it wants to provide contraceptive coverage after all. Third, their opting out incentivizes TPAs to provide

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[41] If TPAs for self-insured church plans decide not to provide contraceptive coverage, plan participants and beneficiaries would not get the coverage to which they are otherwise entitled under the ACA. The dissent suggests it is paradoxical to maintain the ACA ensures plan participants and beneficiaries will receive contraceptive coverage and also acknowledge TPAs for self-insured church plans may in fact decline to provide that coverage. Dissent at 11 n.4. The positions are consistent. The ACA requires all group health plans to provide contraceptive coverage, but because it can only enforce that requirement through ERISA, church plans that are exempt from ERISA do not face any consequences if they fail to meet it. Put differently, the ACA creates a legal duty for *all* group health plans, but the Government cannot enforce that duty against a narrow subset of self-insured church plans. The inability to enforce that duty does not mean the duty does not exist.

coverage even if they are exempt from ERISA. Fourth, the Government has not demonstrated why the plaintiffs must complete the self-certification if their TPAs can decline to provide contraceptive coverage. In addition to the reasons self-insured plans in general are not substantially burdened by the accommodation scheme, we conclude the plaintiffs with self-insured church plans have failed to identify a substantial burden on religious exercise.

1) Hypothetical regulation

The plaintiffs argue the Departments could assert authority over church plans under ERISA at some point in the future. We assess the regulations as they currently exist, not amendments to ERISA's implementing regulations the Department of Labor may hypothetically promulgate. An "[i]njunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur at some indefinite time in the future."*Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). Should the Departments assert ERISA authority over church plans at some later date, plaintiffs may then seek a preliminary injunction to prevent the Departments from enforcing the Mandate. Unless and until the Departments change their position, however, plaintiffs' speculative argument does not warrant a preliminary injunction. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir.2011).

2) No causation from church plan TPA notification

The plaintiffs contend completing the self-certification would be a substantial burden because it would allow TPAs to provide coverage to their group health plan participants and beneficiaries, even if the Departments cannot compel the TPA to do so under ERISA. But plaintiffs with self-insured church plans are not substantially burdened by the requirement that they complete the Form or notification to HHS. As we explained in the previous section on self-insured plans, when a religious non-profit organization opts out of the Mandate, the requirement that the group health plan include contraceptive coverage is a product of federal law, not the product of the organization's opting out. Opting out frees plaintiffs from their obligation to provide contraceptive coverage under the ACA. The lack of substantial burden is especially evident when the group health plan is administered by a TPA that has made clear it will not provide contraceptive coverage on religious grounds. The Little Sisters' TPA, for example, is Christian Brothers, their co-plaintiff in this case. It is clear Christian Brothers need not, and will not, provide contraceptive coverage if the Little Sisters opt out of the Mandate.[42]

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[42] Plaintiff TPAs that administer church plans are not substantially burdened for similar reasons. In the absence of any enforcement power, the Government cannot levy fines against them for declining to provide contraceptive coverage.

3) No incentive from church plan TPA notification

Even when TPAs for self-insured church plans indicate they may comply with the Mandate, the TPAs make that decision, and the objecting religious non-profit organization is not substantially burdened. The plaintiffs in *Reaching Souls* argue one of their TPAs, Highmark, has indicated it will provide contraceptive coverage if they opt out of the Mandate. The *Reaching Souls* plaintiffs argue their act of opting out would not only provide Highmark with permission to provide contraceptive coverage, but would incentivize it to do so because Highmark could then seek reimbursement from the government.

Plaintiffs fail to demonstrate the reimbursement provision actually gives TPAs an incentive to provide coverage. They claim a TPA that receives the Form or a letter from the government "becomes eligible for government payments that will both cover the TPA's costs and include an additional payment (equal to at least 10% of costs) for the TPA's margin and overhead."LS Br. at 16. At a hearing in *Reaching Souls,* counsel for the Government seemed to accept this characterization. But the regulations themselves expressly contradict this reading. They state the payment for margin and overhead goes to health insurance issuers who act as intermediaries for the reimbursement, and need not go to TPAs.[43]

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[43] The Departments credit the health insurance issuer for (1) the total dollar amount of the TPA's payments for contraceptive coverage, and (2) an allowance of at least 10% for

*See*45 C.F.R. § 156.50(d)(5) (specifying health insurance issuers must reimburse TPAs for "the portion of the adjustment attributable to the total dollar amount of the payments for contraceptive services submitted by the third party administrator" but that "[n]o such payment is required with respect to the allowance for administrative costs and margin").

Moreover, even if TPAs were to receive a payment for margin and overhead—set at 15% of costs for 2014—plaintiffs do not demonstrate this allowance actually functions as an incentive to provide contraceptive coverage rather than repayment for the administrative costs TPAs incur by stepping in to arrange for or provide coverage. Plaintiffs have not demonstrated the allowance for administrative overhead actually generates a profit for TPAs, nor have they demonstrated that the allowance would incentivize TPAs to provide coverage where they otherwise would not.

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administrative costs and margin. *See* 45 C.F.R. § 156.50(d)(3). The health insurance issuer then pays the TPA for the total dollar amount of the TPA's payments for contraceptive coverage, but is not required to pay the TPA the allowance for administrative costs and margin. *See* 45 C.F.R. § 156.50(d)(5). As a result, the regulations require only that a TPA receive repayment for what it has actually spent providing contraceptive coverage. A reimbursement solely for costs incurred would not generate a profit or offer any incentive to provide contraceptive coverage.

4) The Government may require affirmative objection

Plaintiffs finally argue that if the Departments lack ERISA enforcement authority against TPAs of self-insured church plans, the Government has no reason to require religious non-profit organizations to comply with the accommodation scheme and deliver the Form or notify HHS. It is the plaintiffs' burden, however, to state a prima facie case under RFRA. Because they cannot establish that signing the Form or notifying HHS constitutes a substantial burden on their religious exercise, we do not question the Departments' interest in requiring them to opt out of the Mandate to avoid penalties for failure to provide contraceptive coverage.[44]

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We conclude the Plaintiffs' causation arguments do not establish a burden on their religious exercise, much less a substantial burden, because opting out would not trigger, incentivize, or otherwise cause the

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[44] The Departments have a sound reason to require an affirmative opt out—not all religious organizations share the beliefs of the Little Sisters, Reaching Souls, Truett–McConnell, and Mid–America Christian. The parties agree that the Departments can require non-objecting employers to provide contraceptive coverage under their group health plans. To enforce that general requirement, the Departments may require objecting employers to affirmatively voice their objection instead of assuming all religious non-profit organizations share the plaintiffs' beliefs.

provision of contraceptive coverage.[15] We therefore turn to Plaintiffs' argument that the act of opting out and the administrative requirements associated with the accommodation make them feel or appear complicit in the overall contraceptive coverage scheme.

e. No substantial burden from complicity

The accommodation relieves Plaintiffs from providing, paying for, or facilitating contraceptive coverage, and federal law requires health insurance issuers and TPAs to provide contraceptive coverage when religious non-profit organizations take advantage of the accommodation. Plaintiffs argue the act of opting out would nevertheless substantially burden their religious exercise because they believe delivering the Form or notification to HHS would make them complicit in the overall scheme to deliver contraceptive coverage. They wish to play no part in it. We find this argument unconvincing for a number of reasons.

First, the purpose and design of the accommodation scheme is to ensure that Plaintiffs are *not* complicit—that they do not have to provide, pay for, or facilitate contraception. Plaintiffs' concern that others may believe they condone the Mandate is unfounded. Opting out sends the unambiguous message that they *oppose* contraceptive coverage and refuse to provide it, and does not foreclose them from

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[15] Under these circumstances, as the Third Circuit observed, "the burden is not merely attenuated at the outset but totally disconnected from the appellees." *Geneva Coll.*, 778 F.3d at 442.

objecting both to contraception and the Mandate in the strongest possible terms.

Second, to the extent Plaintiffs assert that completing the Form or notification violates their religious beliefs, they state a necessary but not a sufficient predicate for a RFRA claim. Under RFRA, they must establish that completing the Form or notification substantially burdens their religious exercise; otherwise, this argument could be used to avoid almost any legal obligation that involves a form. Plaintiffs do not object to signing forms and paperwork generally—they object to the Form or notification to HHS, and they do so because they believe it involves them in directly or indirectly providing, paying for, or facilitating contraceptive coverage, which they oppose as a matter of religious conviction. As we have explained, the Plaintiffs misstate their role in the accommodation scheme. RFRA does not require us to defer to their erroneous view about the operation of the ACA and its implementing regulations.[46]

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[46] Plaintiffs cite *Thomas* for the proposition that we cannot question the theological merit of their religious beliefs. *See Thomas*, 450 U.S. at 715 ("We see, therefore, that Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one."). We agree with that proposition, but we may—indeed, we must—determine whether the accommodation scheme substantially burdens their religious exercise.

In *Thomas*, Mr. Thomas believed he could not participate in the production of war materials. *Id.* at 709. The government argued Mr. Thomas's beliefs did not warrant protection by suggesting those beliefs were inconsistent and not shared by his co-religionists. *Id.* at 714–15. The Supreme Court

Third, because the accommodation does not involve them in providing, paying for, facilitating, or causing contraceptive coverage, Plaintiffs' only

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specifically rejected these attempts to impeach Mr. Thomas's religious beliefs, *id.* at 715–16, but the Court was not confronted with the question of whether those beliefs were substantially burdened. Both the Supreme Court and the Tenth Circuit have indicated that accepting a plaintiff's religious belief does not foreclose an inquiry into whether religious exercise has been substantially burdened. *See, e.g., Hernandez*, 490 U.S. at 699; *Kikumura*, 242 F.3d at 961.

The Government does not question Plaintiffs' religious beliefs that contraception is sinful and they cannot be involved in providing, paying for, or facilitating contraceptive coverage. But Plaintiffs go beyond *Thomas* when they insist that we cannot question whether opting out makes them complicit in providing contraceptive coverage. We may properly consider that opting out excuses them from providing coverage, does not cause that coverage to be extended to plan participants and beneficiaries, and involves only routine administrative tasks that are not substantial burdens under RFRA. *See Little Sisters*, 6 F.Supp.3d at 1239 ("Thus, Plaintiff's contention that the Court cannot look behind their statements about what offends their religious beliefs is well-supported. However, the Court is under no such restriction with regard to Plaintiffs' construction of how the Final Rules operate, including the administrative burdens imposed on the parties by these regulations.").

For these reasons, *Thomas* is inapposite when the inquiry focuses on whether a burden is substantial. It does not preclude courts from examining the relationship between a sincerely held religious belief and the alleged burden imposed by the Government. This important distinction prevents the Government from having to survive strict scrutiny whenever a plaintiff misunderstands the burden being placed upon them—for example, if Mr. Thomas had been required to produce equipment for farming and sincerely, but incorrectly, believed that equipment was being produced for war. *See, e.g., Priests for Life*, 772 F.3d at 249 n. 14.

involvement in the scheme is the act of opting out. Plaintiffs are not substantially burdened solely by the *de minimis* administrative tasks this involves. All opt-out schemes require some affirmative act to free objectors from the obligations they would otherwise face. The Plaintiffs' logic would undermine conscientious objection schemes that require the objection to be made, relieve objectors of their obligations, but assign those obligations to other, non-objecting actors in their stead. *See, e .g., Gillette v. United States,* 401 U.S. 437 (1971) (acknowledging a petitioner must complete an exemption application to obtain conscientious objector status in wartime); *Welsh v. United States,* 398 U.S. 333 (1970) (same).[47] Having to file paperwork or otherwise register a religious objection, even if one disagrees with the ultimate aim of the law at issue, does not alone substantially burden religious exercise.

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[47] As other courts have observed, invalidating the accommodation scheme would run contrary to many other laws allowing objectors to opt out of government programs and requirements. *See Priests for Life,* 772 F.3d at 245 (deeming Plaintiffs' argument against the accommodation scheme "extraordinary and potentially far reaching"); *Univ. of Notre Dame v. Sebelius,* 743 F.3d 547, 557 (7th Cir.2014), *vacated and remanded sub nom., Univ. of Notre Dame v. Burwell,* —— U.S. ——, 135 S.Ct. 1528, 191 L.Ed.2d 557 (2015) ("The novelty of Notre Dame's claim—not for the exemption, which it has, but for the right to have it without having to ask for it—deserves emphasis.... What makes this case and others like it involving the contraception exemption paradoxical and virtually unprecedented is that the beneficiaries of the religious exemption are claiming that the exemption process itself imposes a substantial burden on their religious faiths.").

The Government may therefore require religious objectors to complete *de minimis* administrative tasks to opt out. Filing the Form or notifying HHS easily fits within this category. The Departments have made opting out of the Mandate at least as easy as obtaining a parade permit, filing a simple tax form, or registering to vote—in other words, a routine, brief administrative task. The purpose of the Form or notification to HHS is to extricate Plaintiffs from their legal obligation to provide contraceptive coverage. Opting out ensures they will play no part in the provision of contraceptive coverage, prohibits TPAs and health insurance issuers from sharing the costs of providing coverage with them, and requires notice to employees that they do not administer or fund contraceptive services.

The notification to HHS is especially minimal, as it requires Plaintiffs only to register their objection with HHS and does not require any contact with their health insurance issuers or TPAs. Although Plaintiffs must tell HHS which health insurance issuer or TPA they use to opt out of the Mandate, this is not a substantial burden on religious exercise.[48] It is the kind of administrative task the

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[48] Plaintiffs using the Form need only enter the name of the objecting organization, name and title of the individual authorized to make the certification on behalf of the organization, and the mailing address, email address, and phone number of that individual. That person signs, dates, and sends the form to their TPA or health insurance issuer. Employers are required to keep the Form on file for six years. The Plaintiffs have leeway in drafting a notification to HHS, which need only include

Departments can require of religious believers in the administration of governmental programs. *See Priests for Life*, 772 F.3d at 246; *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305–06 (1985); *see also Jimmy Swaggart Ministries v. Bd. of Equaliz. of Cal.*, 493 U.S. 378, 395 (1990); *Hernandez*, 490 U.S. at 696–97. When understood in light of the ACA's requirement that group health plans and health insurance issuers provide contraceptive coverage and the manner in which the accommodation relieves Plaintiffs of providing that coverage, identifying one's TPA in a letter to HHS is at most a minimal burden and certainly not a substantial one.

Finally, Plaintiffs are not substantially burdened when, after they opt out and are relieved of their obligations under the Mandate, health insurance issuers or TPAs must provide contraception to plan participants and beneficiaries. Plaintiffs sincerely oppose contraception, but their

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the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to providing coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers.

79 Fed.Reg. at 51,094–95.

religious objection cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA. "Religious objectors do not suffer substantial burdens under RFRA where the only harm to them is that they sincerely feel aggrieved by their inability to prevent what other people would do to fulfill regulatory objectives after they opt out." *Priests for Life*, 772 F.3d at 246. Pre-*Smith* case law and RFRA's legislative history underscore that religious exercise is not substantially burdened merely because the Government spends its money or arranges its own affairs in ways that plaintiffs find objectionable. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450–54 (1988); *Bowen*, 476 U.S. at 699–700; *Tony & Susan Alamo Found.*, 471 U.S. at 303; S.Rep. No. 103–111, at 9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 ("[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."). RFRA does not prevent the Government from reassigning obligations after an objector opts out simply because the objector strongly opposes the ultimate goal of the generally applicable law.

Plaintiffs' complicity argument therefore fails. Opting out would eliminate their complicity with the Mandate and require only routine and minimal administrative paperwork, and they are not substantially burdened by the Government's subsequent efforts to deliver contraceptive coverage in their stead.

f. No burden from ongoing requirements

As a final argument, Plaintiffs deny the act of opting out would free them from further involvement in the provision of contraceptive coverage. They argue the accommodation scheme would require their ongoing participation, and give two examples to support this claim.

First, Plaintiffs argue they would remain involved because the Departments are commandeering their group health plans to provide contraceptive coverage to their employees. They note their TPA or health insurance issuer can provide coverage only as long as plan participants and beneficiaries remain employed with the religious non-profit organization.

Plaintiffs have not shown, assuming they opt out, how the provision of coverage to plan participants and beneficiaries through the health insurance issuer or TPA would substantially burden their religious exercise. Plaintiffs' plan participants and beneficiaries are not guaranteed contraceptive coverage without cost sharing because they work for the Plaintiffs; they are guaranteed contraceptive coverage under the ACA. The ACA mandates health insurance that includes contraceptive coverage. *See* 42 U.S.C. § 300gg–13(a)(4). Plaintiffs' theory would not only relieve them of complying with the Mandate, it would prevent health insurance issuers and TPAs from stepping in under the ACA to provide plan participants and beneficiaries with the coverage they are entitled to receive under federal law.

Second, Plaintiffs object that they must (a) notify their TPA or health insurance issuer when employees join or leave their broader health insurance scheme, and (b) complete the self-certification or notification to HHS when they create or terminate a relationship with a TPA or health insurance issuer. As to the first requirement, employers already must notify their TPA or health insurance issuer when they hire or fire employees. The communication with the TPA or health insurance issuer regarding general health insurance coverage for entering or exiting plan participants and beneficiaries would occur regardless of any legal obligation under the accommodation scheme. The latter requirement, however, is an obligation specific to the accommodation scheme. An insured or self-insured employer using the Form must send it to "each" TPA or health insurance issuer as the employer forms contractual relationships with them. 26 C.F.R. § 54.9815–2713AT(b)(1)(ii); 29 C.F.R. § 2590.715–2713A(b)(1)(ii). If the employer instead uses the notification process, the regulations state: "If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services."26 C.F .R. § 54.9815–2713AT(b)(1)(ii)(B); 29 C.F.R. § 2590.715–2713A(b)(1)(ii)(B).

Once again, this does not constitute a substantial burden. The only new requirement is that employers must complete the Form or notify HHS of their objection when they contract with a new health insurance issuer or TPA. Plaintiffs do not argue the time, cost, or energy required to comply

with this requirement constitutes a substantial burden; they argue it is the moral significance of their involvement which burdens their religious exercise.[49] If the first self-certification is not a substantial burden, a second or third self-certification would not be substantially burdensome given the extremely minimal administrative requirements of the Form or notification. As we have discussed above, *de minimis* administrative requirements do not themselves amount to substantial burdens on religious liberty. *See Tony & Susan Alamo Found.*, 471 U.S. at 305–06; *see also Jimmy Swaggart Ministries*, 493 U.S. at 394–95; *Hernandez*, 490 U.S. at 696–97. If the actual delivery of the Form or notification is not a substantial burden, a contingent administrative requirement to update the Form or notification is not either.

The regulations require the Plaintiffs to complete the Form or deliver the notification if they wish to opt out. But this ministerial act to opt out is not a substantial burden on religious exercise, nor are the collateral requirements of the scheme. The Departments have allowed Plaintiffs to opt out of a neutral and generally applicable requirement imposed by federal law, and have done so in a manner that affirmatively distances those organizations from the provision of contraceptive coverage that other employers must provide. It is not

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[49] The interim final rules estimate "the total annual burden for preparing and providing the information in the self-certification or notice to HHS will require approximately 50 minutes for each eligible organization with an equivalent cost burden of approximately $53."79 Fed.Reg. at 51,097.

a substantial burden to require organizations to provide minimal information for administrative purposes to take advantage of that accommodation.

C. *Strict Scrutiny*

Because we determine Plaintiffs have failed to demonstrate a substantial burden on their religious exercise, we need not address whether the Departments have shown a compelling state interest and adopted the least restrictive means of advancing that interest.[50]

D. Conclusion

In the absence of a substantial burden, Plaintiffs have not demonstrated a strong likelihood of success on the merits of their RFRA claim, nor have they demonstrated they will suffer irreparable injury if an injunction is denied. Accordingly, a preliminary injunction on RFRA grounds is inappropriate.

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[50] We recognize third-party rights and interests are at stake in this litigation—namely, that plan participants and beneficiaries are entitled by law to contraceptive coverage without cost sharing. When evaluating RFRA and Free Exercise claims, courts properly consider the impact of religious liberty claims on pre-existing rights holders. *Hobby Lobby*, 134 S.Ct. at 2760 (emphasizing "[t]he effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero"); *see Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709–10 (1985); *Yoder*, 406 U.S. at 230; *Sherbert*, 374 U.S. at 409; *Braunfeld*, 366 U.S. at 604–05. Because we determine Plaintiffs have not demonstrated a substantial burden on their religious exercise, we do not reach the strict scrutiny analysis where the rights and interests of third parties are properly weighed.

VI. FIRST AMENDMENT

Although the district courts focused almost exclusively on RFRA, Plaintiffs also raised constitutional claims. They argue the accommodation scheme violates the Free Exercise and Establishment Clauses of the First Amendment by exempting religious employers from the Mandate but requiring religious non-profit organizations to seek an accommodation.[51] Plaintiffs also argue the

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[51] In this discussion of First Amendment claims, "Plaintiffs" refers only to the plaintiffs in *Little Sisters* and *Reaching Souls*, and not *Southern Nazarene*.All of the plaintiffs raised First Amendment claims in their complaints, but only the *Little Sisters* and *Reaching Souls* plaintiffs preserved these claims in their subsequent motions for a preliminary injunction and briefs on appeal. App. in LS at 57a–66a, 136a–38a; App. in RS at A65–74, A145–49.

The district courts in *Little Sisters* and *Reaching Souls* did not reach the First Amendment claims. In *Little Sisters*, the court found the plaintiffs' assertion of irreparable harm—which they were required to show to obtain a preliminary injunction, *see Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir.2009)—was based only on RFRA. *See Little Sisters*, 6 F.Supp.3d at 1245. In *Reaching Souls*, the court determined it did not need to reach First Amendment claims because it granted a preliminary injunction on RFRA grounds. *See Reaching Souls*,2013 WL 6804259, at *8 n. 9.

On appeal, we consider the First Amendment claims in both cases. First, the *Little Sisters* plaintiffs made a sufficient argument before the district court. They expressly sought a preliminary injunction on First Amendment as well as RFRA grounds. App. in LS at 136a–138a. They did not elaborate on their First Amendment claims in the irreparable harm analysis, but "[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."*Kikumura*, 242 F.3d at 963 (quotations omitted). Second, although we reverse the district

accommodation scheme simultaneously compels and silences their speech in violation of the Free Speech Clause of the First Amendment. We disagree and conclude the accommodation scheme comports with the First Amendment. We note that the same standard of review we identified for the RFRA claim applies to the First Amendment claims.

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court's grant of a preliminary injunction on RFRA grounds in *Reaching Souls*, plaintiffs there raised the question whether that preliminary injunction is appropriate on First Amendment grounds. "If the district court fails to analyze the factors necessary to justify a preliminary injunction, this court may do so if the record is sufficiently developed."*Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1224 (10th Cir.2009); *see also Hobby Lobby*, 723 F.3d at1145 ("The record we have is the record the parties chose to create below-it is the record they deemed sufficient for the district court to decide the preliminary injunction question. For each element, we believe this record suffices for us to resolve each of the remaining preliminary injunction factors."). Because the First Amendment claims in both *Little Sisters* and *Reaching Souls* are legal questions that have been fully briefed on appeal, we resolve those questions in this opinion rather than remanding them to the district courts and prolonging this litigation.

By contrast, the *Southern Nazarene* plaintiffs included First Amendment claims in their complaint, but did not assert them in their motion for a preliminary injunction or accompanying memorandum of law. As a result, the district court did not reach any First Amendment claims in its decision. *See Southern Nazarene*, 2013 WL 6804265. Moreover, the *Southern Nazarene* plaintiffs do not make First Amendment claims in their opening brief on appeal.

Although we believe our First Amendment analysis applies to all group health plans and does not depend on whether they are insured, self-insured, or self-insured church plans, we note *Little Sisters* and *Reaching Souls* involve only self-insured church plans that are not subject to ERISA, and the insured and self-insured plans discussed in *Southern Nazarene* are not before us.

A. Free Exercise Clause

Plaintiffs contend the ACA and its implementing regulations violate the Free Exercise Clause by exempting some religious objectors—churches and their "integrated auxiliaries"—from the Mandate, while requiring others—specifically, religious non-profit organizations—to comply with the Mandate, seek an accommodation, or pay substantial fines. They have not explained how their Free Exercise claim differs from their Establishment Clause claim, nor do they explain how they could prevail under the standard in *Smith* if they are unlikely to succeed under RFRA. Because we conclude the Mandate and accommodation scheme are neutral and generally applicable laws, they are subject only to rational basis review, which they survive.

1. Legal Background

The First Amendment's religion clauses state: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."U.S. Const. amend. 1. To resolve challenges under the Free Exercise Clause, we use a well-established framework. If a law is neutral and generally applicable, it does not violate the Free Exercise Clause "even if the law has the incidental effect of burdening a particular religious practice."*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993); *see Smith*, 494 U.S. at 878–80. "A law is neutral so long as its object is something other than the infringement or restriction of religious practices."*Grace United*, 451 F.3d at 649–50. A law that is facially neutral may

nevertheless fail the neutrality test if it covertly targets religious conduct for adverse treatment. *Lukumi Babalu,* 508 U.S. at 534.

To determine whether a law is generally applicable, we ask if the "legislature decide[d] that the governmental interests it seeks to advance are worthy of being pursued only against conduct with a religious motivation."*Id.* at 542–43. "[A] law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge."*Grace United,* 451 F.3d at 649.

2. The Mandate and Accommodation Scheme are Neutral

The Mandate and the accommodation scheme are neutral laws. *See Priests for Life,* 772 F.3d at 267–69; *Mich. Catholic Conf.,* 755 F.3d at 393–94. The Mandate is facially neutral with regard to employers, and neither the history nor the text of the ACA and its implementing regulations suggest the Mandate was targeted at a particular religion or religious practice. Plaintiffs cannot show Congress or HHS "had as their object the suppression of religion."*Lukumi Babalu,* 508 U.S. at 542. To the contrary, the Mandate arose from concerns about the personal and social costs of barriers preventing women from receiving preventive care, including reproductive health care. *See* IOM, *Clinical Preventive Services for Women: Closing the Gaps* 102–03 (2011), *available at* www.nap.edu/catalog.php?record_id=13181. The accommodation scheme was developed to facilitate

the free exercise of religion, not to target religious groups or burden religious practice. To that end, the Departments expanded the religious employer exemption and religious non-profit organization accommodation to respond to the concerns of religious groups. The Plaintiffs' apparent dissatisfaction with the accommodation offered to them does not mean the Mandate or the accommodation scheme is non-neutral.

3. The Mandate and Accommodation Scheme are Generally Applicable

The Mandate and the accommodation scheme are also generally applicable. *See Priests for Life*, 772 F.3d at 267–69; *Mich. Catholic Conf.*, 755 F.3d at 393–94. Plaintiffs cannot show Congress or the Departments sought to impose the Mandate only against religious groups; to the contrary, the Mandate applies to all employers with more than fifty employees using non-grandfathered health plans.[52] "The exemptions do not render the law so

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[52] *Smith* stated that "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of religious hardship without compelling reason." *Smith*, 494 U.S. at 884 (quotations and citation omitted). But as we noted in *Grace United*, "we have already refused to interpret *Smith* as standing for the proposition that a secular exemption automatically creates a claim for a religious exemption." *Grace United*, 451 F.3d at 651. We have instead held:

> a system of individualized exemptions is one that gives rise to the application of a subjective test. Such a system is one in which case-by-case inquiries are routinely made, such that there is an individualized

under-inclusive as to belie the government's interest in protecting public health and promoting women's well-being or to suggest that disfavoring Catholic or other pro-life employers was its objective."*Priests for Life,* 772 F.3d at 268. Plaintiffs fail to demonstrate the accommodation scheme targets religious conduct or was created with the objective of disfavoring particular faiths. *Lukumi Babalu,* 508 U.S. at 542–43. To the contrary, the Mandate was enacted as part of a larger program of health care reform, and both the exemption for religious employers and the accommodation for religious nonprofit organizations demonstrate federal deference to religious liberty concerns and were promulgated to facilitate rather than inhibit the free exercise of religion.

4. The Mandate and Accommodation Scheme Have a Rational Basis

Rather than make an argument based on the rational relationship standard, Plaintiffs instead contend our decision in *Hobby Lobby* precludes us from finding that public health and gender equality, without greater specificity, constitute compelling

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> governmental assessment of the reasons for the relevant conduct that invites considerations of the particular circumstances involved in the particular case.

Axson-Flynn v. Johnson, 356 F.3d 1277, 1297 (10th Cir.2004) (quotations and citations omitted). None of the categorical exemptions enacted by the ACA and its implementing regulations establish a system of individualized objections. And for the reasons detailed above, we believe the accommodation scheme effectively relieves objecting religious non-profit organizations of their obligations.

governmental interests. But, as we have explained, the compelling interest test does not apply; the rational basis test does. *Grace United,* 451 F.3d at 649. The Government observes that in the cases before us, the accommodation scheme rationally serves the twin interests of facilitating religious exercise and filling coverage gaps resulting from accommodating that religious exercise.

On rational basis review, these interests are sufficient. Alleviating governmental interference with religious exercise, which the accommodation scheme does, is a permissible legislative purpose. *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter–Day Saints v. Amos,* 483 U.S. 327, 335 (1987). And we need not scrutinize whether the Government's interest in public health and gender equality is more compelling in this case than in *Hobby Lobby.*We need only determine that public health and gender equality are *legitimate* state interests. We believe they meet this more permissive standard, which is not foreclosed by our compelling interest analysis in *Hobby Lobby.See, e.g., Hobby Lobby,* 723 F.3d at 1143 (determining public health and gender equality are too broad to satisfy the compelling interest test but noting "[w]e recognize the importance of these interests").[53] The

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[53] *See also Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 549 (1987) (identifying "a compelling interest in eliminating discrimination against women"); *Roberts v. U.S. Jaycees,* 468 U.S. 609, 626, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("Assuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."); *Prince v. Massachusetts,* 321 U.S. 158, 165–67 (1944) (upholding child labor laws against a free exercise

accommodation scheme advances both the free exercise of religion and the Government's legitimate interests in public health and gender equality. *See Hobby Lobby*, 134 S.Ct. at 2759 ("We therefore conclude that [the accommodation] system constitutes an alternative that achieves all of the Government's aims while providing greater respect for religious liberty.").

Furthermore, when applying the rational basis test, we are not limited to interests specifically articulated by the Departments. We may look to any conceivable legitimate governmental interest, and "the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) (citations and internal quotations omitted). The more specific governmental interest in health by ensuring access to contraception without cost sharing, which we did not specifically address in *Hobby Lobby*, would constitute a legitimate interest conceivably advanced by the accommodation scheme. *See Hobby Lobby*, 723 F.3d at 1160 (Bacharach, J., concurring) ("[T]he plurality does not mention the public interest that the government had relied on at the preliminary-injunction hearing: the health

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challenge on health and welfare grounds); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (upholding a mass vaccination program against a liberty challenge on health and welfare grounds); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (determining a compelling interest in eradicating racial discrimination "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs").

reasons for promoting employee access to emergency contraceptives."). The Departments' recognized interest in the uniformity and ease of administration of its programs would also meet this standard. *See, e.g., Bowen*, 476 U.S. at 707; *Hernandez*, 490 U.S. at 682; *United States v. Lee*, 455 U.S. 252, 258–59 (1982).

The Mandate and accommodation scheme easily pass the rational basis test. Because the Mandate is both neutral and generally applicable and supported by a rational basis, Plaintiffs fail to make out a plausible claim under the Free Exercise Clause.

B. Establishment Clause

Plaintiffs contend that exempting churches and integrated auxiliaries from the Mandate but requiring religious non-profit organizations to seek an accommodation violates the Establishment Clause. We disagree. Because the Departments have chosen to distinguish between entities based on neutral, objective organizational criteria and not by denominational preference or religiosity, the distinction does not run afoul of the Establishment Clause.

1. Organizational Distinctions Well-Established in Federal Law

Federal law distinguishes between different types of religious organizations, and as we discuss below, this differentiation is constitutionally permissible. Under the ACA and its implementing regulations, a religious employer "is organized and

operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i) or (a)(3)(A)(iii) of the Internal Revenue Code of 1986, as amended."45 C.F.R. § 147.131(a). .The regulations at issue in this case draw on the tax code's distinction between houses of worship and religious non-profits, a "longstanding and familiar" distinction in federal law. *Priests for Life,* 772 F.3d at 238; *see also Geneva Coll.*, 778 F.3d at 443 (determining it was permissible for the Departments to base the exemption on the IRC's provision "because that provision was a bright line that was already statutorily codified and frequently applied").

Exempting churches while requiring other religious objectors to seek an accommodation is standard practice under the tax code. The IRC and other regulations award benefits to some religious organizations—typically, houses of worship—based on articulable criteria that other religious organizations do not meet. *See* 26 U.S.C. § 6033(a)(3)(A)(i), (iii). Churches, their integrated auxiliaries, and conventions or associations of churches are automatically considered tax exempt and need not notify the government they are applying for recognition, but other religious non-profit organizations must apply for tax-exempt status if their annual gross receipts are more than $5,000. *See id.* § 508(a), (c)(1)(A). Similarly, churches, their integrated auxiliaries, conventions or associations of churches, and the exclusively religious activities of any religious order need not file tax returns, but religious non-profit organizations with gross receipts above $5,000—even if they are tax-exempt—must file annually. *Id* .§ 6033(a).

Congress has placed special limitations on tax inquiries and examinations of churches, but not integrated auxiliaries, church-operated schools, or religious non-profit organizations. *See id.* § 7611.

Congress has used similar organizational distinctions in the realm of religious accommodations. Churches and qualified church-controlled organizations that object to paying Social Security and Medicare taxes for religious reasons may opt out of paying them by filing a form with the IRS, but other religious non-profit organizations may not. *See id.* § 3121(w).

2. Organizational Distinctions and Respecting the Religion Clauses

Distinctions based on organizational form enable the government to simultaneously respect both the Free Exercise Clause and Establishment Clause and permit the construction of accommodation schemes that pass constitutional muster. The Supreme Court has concluded

> [t]he general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970); *see also Catholic Charities of Diocese of Albany v. Serio*, 859 N.E.2d 459, 469 (N.Y.2006) (observing the Plaintiffs' argument here "would call into question any limitations placed by the Legislature on the scope of any religious exemption—and thus would discourage the Legislature from creating any such exemptions at all," and thus concluding "[a] legislative decision not to extend an accommodation to all kinds of religious organizations does not violate the Establishment Clause"). We recognize the Government enjoys some discretion in fashioning religious accommodations, and believe doing so on the basis of organizational form comports with the Establishment Clause.

3. Organizational Distinctions Compatible with *Larson* and *Colorado Christian*

The Departments have offered the accommodation to Plaintiffs based on their organizational form. Plaintiffs rely on the decisions in *Larson v. Valente*, 456 U.S. 228 (1982), and *Colorado Christian University v. Weaver*, 534 F.3d 1245 (10th Cir.2008), to support their Establishment Clause claim. But those cases do not hold that distinctions based on organizational type are impermissible.

Larson involved an Establishment Clause challenge to a Minnesota law that imposed registration and reporting requirements on religious organizations that received less than half of their contributions from members or affiliated organizations. *Larson*, 456 U.S. at 231. The

legislature drew this distinction to discriminate against particular religions, which was evident in the legislative history. *Id.* at 253–54 ("[T]he history of [the challenged law] demonstrates that the provision was drafted with the explicit intention of including particular religious denominations and excluding others.").*Colorado Christian* differentiated institutions based on intrusive inquiries into their degree of religiosity. 534 F.3d 1259. In *Colorado Christian,* we concluded Colorado's exclusion of "pervasively sectarian" institutions from state scholarship programs violated the First Amendment "for two reasons: the program expressly discriminates among religions without constitutional justification, and its criteria for doing so involve unconstitutionally intrusive scrutiny of religious belief and practice."*Id.* at 1250. Neither of these two concerns in *Colorado Christian* is applicable here.

Larson and *Colorado Christian* prohibit preferences based on denomination (e.g., Catholic, Jewish, Islamic, etc.) and religiosity (e.g., pervasively sectarian, moderately sectarian, non-sectarian, etc.), but do not prohibit distinctions based on organizational type (e.g., church, non-profit, university, etc.). As *Larson* noted: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."456 U.S. at 244. In *Colorado Christian,* we determined that "defendants supply no reason to think that the government may discriminate between 'types of institution' on the basis of the nature of the religious practice these institutions are moved to engage in."534 F.3d at 1259. As a result, Establishment Clause

jurisprudence clearly indicates denominational preferences expressed by the government are subject to strict scrutiny. *See id.*Religiosity distinctions are subject to strict scrutiny as well because they involve the government in scrutinizing and making decisions based on particular expressions of religious belief. *See id.* at 1256 (invalidating Colorado law because it "expressly discriminates *among* religions, allowing aid to 'sectarian' but not 'pervasively sectarian' institutions, and it does so on the basis of criteria that entail intrusive governmental judgments regarding matters of religious belief and practice").

Plaintiffs cite no case holding that organizational distinctions, as opposed to those based on denomination or religiosity, run afoul of the Establishment Clause. Unlike *Awad v. Ziriax,* 670 F.3d 1111, 1128–29 (10th Cir.2012), which concerned a state constitutional amendment forbidding courts from considering or using Sharia law, evidence of animus or favoritism aimed at a denomination or degree of religiosity is absent here. "Because the law's distinction does not favor a certain denomination and does not cause excessive entanglement between government and religion, the framework does not violate the Establishment Clause."*Mich. Catholic Conf.,* 755 F.3d at 395; *see also Priests for Life,* 772 F.3d at 272–74.

Neither *Larson* nor *Colorado Christian* supports Plaintiffs' claim that distinctions between churches and other religious entities is impermissible. As we concluded in *Colorado Christian,*"if the State wishes to choose among otherwise eligible institutions, it must employ neutral, objective criteria rather than

criteria that involve the evaluation of contested religious questions and practices."534 F.3d at 1266. This is what the Departments have done with the accommodation scheme in compliance with the First Amendment's Establishment Clause.

4. Plaintiffs' Argument Based on the Departments' Rationale

Plaintiffs seize on the Departments' rationale for the distinction that religious nonprofit organizations are more likely than churches to employ individuals who do not share their employers' beliefs but are nevertheless entitled to contraceptive coverage under the ACA. *See* 78 Fed.Reg. at 39,874 ("Houses of worship and their integrated auxiliaries that object to contraceptive coverage on religious grounds are more likely than other employers to employ people of the same faith who share the same objection, and who would therefore be less likely than other people to use contraceptive services even if such services were covered under their plan."). Plaintiffs argue some denominations are less likely to carry out ministry functions through a church or integrated auxiliary than others, and that the workforces of some non-profit institutions may be more religiously homogenous than the workforces of some established churches.

The Departments' rationale may not be perfectly accurate, but it does not make the accommodation scheme unconstitutional. The class of religious non-profit organizations encompasses a vast array of religiously affiliated universities, hospitals, service providers, and charities, some of them employing

thousands of people. Of course, some religious non-profit organizations may be more likely than some churches to employ co-religionists, but the Departments may reasonably recognize that, on the whole, churches are more likely to employ those who share their beliefs. *Priests for Life*, 772 F.3d at 272. The Departments originally exempted religious employers to "respect[ ] the unique relationship between a house of worship and its employees in ministerial positions."76 Fed.Reg. at 46,623. We recognize that relationship between houses of worship and ministerial employees has been given special solicitude under the First Amendment. *See Hosanna–Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S.Ct. 694, 712–13 (2012). The Departments must avoid inquiries that involve them in "excessive entanglement" between religion and government, *see Colorado Christian*, 534 F.3d at 1261–62, and the general notion that houses of worship are more likely than religious non-profit organizations to employ people of the same faith avoids impermissible scrutiny into the beliefs of religious entities and their employees.[54]

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[54] The original definition of "religious employer" required that the employer "primarily employs persons who share its religious tenets [and] primarily serves persons who share its religious tenets."76 Fed.Reg. at 46,623. In response to religious entities that argued these requirements might involve excessive entanglement with religion, the Departments eliminated three of the four criteria and based the definition solely on organizational form. 78 Fed.Reg. at 8459. Plaintiffs now contend that simplified definition makes unfounded assumptions about who religious employers employ.

Drawing a distinction between religious employers and religious non-profit organizations is a neutral and reasonable way for the Departments to pursue their legitimate goals in a constitutional manner. It gives special solicitude to churches to facilitate the liberties guaranteed by the Free Exercise Clause, and offers the accommodation scheme to relieve religious non-profit organizations of their obligation to provide contraceptive coverage under the Mandate without imposing a substantial burden on their religious exercise. The accommodation scheme does not violate the Establishment Clause.

C. *Free Speech Clause*

Plaintiffs finally contend the accommodation scheme violates the Free Speech Clause of the First Amendment, which states that "Congress shall make no law ... abridging the freedom of speech,"U.S. Const. amend. 1, by compelling them both to speak and remain silent, *see Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988). First, they argue that requiring them to sign and deliver the Form or the notification to HHS constitutes compelled speech. Second, they argue that prohibiting them from influencing their TPAs' provision of contraceptive coverage compels them to be silent. Both arguments fail.

1. Compelled Speech

The compelled speech claim fails. To the extent such a claim requires government interference with the plaintiff's own message, *see Johanns v. Livestock*

Mktg. Ass'n, 544 U.S. 550, 557 (2005) (stating a compelled speech claim arises when "an individual is obliged personally to express a message he disagrees with, imposed by the government"), the regulations do not require an organization seeking an accommodation to engage in speech it finds objectionable or would not otherwise express. The only act the accommodation scheme requires is for religious non-profit organizations with group health plans to sign and deliver the Form or notification expressing their religious objection to providing contraceptive coverage. The Sixth Circuit reasoned: "Even assuming the government is compelling this speech, it is not speech that the appellants disagree with and so cannot be the basis of a First Amendment claim."*Mich. Catholic Conf.*, 755 F.3d at 392; *see also Geneva Coll.*, 778 F.3d at 438–39 ("If anything, because the appellees specifically state on the self-certification form that they *object* on religious grounds to providing such coverage, it is a declaration that they will *not be complicit* in providing coverage."). Plaintiffs cannot point to speech they are required to express and find objectionable.[55]

Indeed, Plaintiffs have not shown any likelihood that their sending in the Form or the notification would convey a message of support for contraception. Plaintiffs do not demonstrate their TPA, their health

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[55] In *Axson–Flynn*, we recognized that a compelled speech claim may apply to non-ideological speech. We held a University of Utah theater student had alleged a compelled speech violation because she was required to utter certain swear words as part of a script and objected to doing so on religious grounds. 356 F.3d at 1284 n. 4.

insurance issuer, or HHS-any one of which would be the sole recipient of the Form or notification-would view it as anything other than an objection to providing contraception. *Rumsfeld v. Forum for Academic & Inst. Rights, Inc.* ("*FAIR*"), 547 U.S. 47 (2006), is instructive. In *FAIR*, a group of law schools challenged the Solomon Amendment, a federal statute that denied federal funding to universities that barred military recruiters from their campuses. At that time, the military did not permit gay, lesbian, and bisexual individuals to serve. The schools claimed a First Amendment compelled speech violation, arguing their compliance with the Solomon Amendment would signal their agreement with this policy. The Supreme Court rejected the argument, noting compliance did not signal agreement with the military's positions, and the Solomon Amendment did not prevent the schools from making their own position clear. *FAIR*, 547 U.S. at 65.

This point is even stronger in the instant case, where Plaintiffs would send the Form or notification to convey their *opposition* to providing contraception, and the ACA and implementing regulations do not prevent them from expressing that opposition widely. Plaintiffs remain free to express opposition to contraception; "[n]othing in the[ ] final regulations prohibits an eligible organization from expressing its opposition to the use of contraceptives."78 Fed.Reg. at 39,880 n.41. With the passage of the interim final rule, Plaintiffs also have the option to send a letter or email to HHS expressly objecting to any provision of contraception. They can fully explain their position in that notification. We are especially

unconvinced that this option, freed from the text of the Form and permitting greater self-expression, forces Plaintiffs to engage in unwanted speech. Plaintiffs have not suggested the notification must be conveyed or communicated to any third parties or wider audience aside from the Departments themselves.

Even if Plaintiffs could identify speech they disagreed with—for example, identifying the name of their TPA or health insurance issuer—the argument that they are forced to send a message they do not wish to send is unavailing. The First Amendment does not—and cannot—protect organizations from having to make any and all statements "they wish to avoid." The cases cited by Plaintiffs are not about routine administrative burdens akin to complying with the accommodation scheme. These cases instead concern compelled ideological expression such as salutes to the flag, *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 634 (1943); messages on license plates, *Wooley v. Maynard,* 430 U.S. 705, 715 (1977), *Cressman v. Thompson,* 719 F.3d 1139, 1152 (10th Cir.2013); wearing school slogans, *Frudden v. Pilling,* 742 F.3d 1199, 1203–04 (9th Cir.2014); and taking a political stance on commercial sex, *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.,*133 S.Ct. 2321, 2331 (2013).

"Compelling an organization to send a form to a third party to claim eligibility for an exemption 'is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest

that it is.' " *Priests for Life*, 772 F.3d at 271 (quoting *FAIR*, 547 U.S. at 62). "That would be the equivalent of entitling a tax protester to refuse on First Amendment grounds to fill out a 1099 form and mail it to the Internal Revenue Service." *Wheaton College*, 2015 WL 3988356, at *8. None of the cases cited by Plaintiffs involve compliance with the administrative requirements of a government program, and especially not a government program designed to exempt and distance an organization from activity it finds objectionable.

We finally note that Plaintiffs' signature and delivery of the Form or notification to HHS is "plainly incidental to the ... regulation of conduct" and thus is not protected speech. *FAIR*, 547 U.S. at 62. The act of signing and delivering the Form or notification to HHS is required to opt out of the Mandate. The Supreme Court has "rejected the view that 'conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'Instead, we have extended First Amendment protection only to conduct that is inherently expressive."*Id.* at 65–66 (quoting *United States v. O'Brien*, 391 U.S. 367, 376 (1968)). The fact that Plaintiffs must complete the Form or notification to HHS to opt out of coverage does not render the act inherently expressive. *See id.* at 62.

For the foregoing reasons, we reject Plaintiffs' compelled speech claim.

2. Compelled Silence

We further reject the claim that the accommodation scheme compels Plaintiffs' silence. Like the Sixth and Seventh Circuits, we note Plaintiffs have made only general claims objecting to the non-interference regulation and have failed to indicate how it precludes speech in which they wish to engage. *Mich. Catholic Conf.*, 755 F.3d at 39293; *Univ. of Notre Dame v. Sebelius*, 743 F.3d 547, 561 (7th Cir.2014), *vacated and remanded sub nom., Univ. of Notre Dame v. Burwell*, 135 S.Ct. 1528 (2015). After the issuance of the interim final rule repealing the non-interference regulation, we do not believe this question is before us. We agree with the Government and the D.C. Circuit that the repeal of the non-interference rule renders Plaintiffs' claims regarding compelled silence moot. *See Priests for Life*, 772 F.3d at 242 n. 8.

VII. CONCLUSION

We have reviewed the district courts' decisions to grant or deny a preliminary injunction to Plaintiffs in the three cases before us. Because we determine the ACA and its implementing regulations do not substantially burden Plaintiffs' religious exercise or violate the Plaintiffs' First Amendment rights, Plaintiffs have not established a likelihood of success on the merits or a likely threat of irreparable harm as required for a preliminary injunction. *See Hobby Lobby*, 723 F.3d at 1128.

We therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, 6

F.Supp.3d 1225, and reverse the district courts' grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265, and *Reaching Souls*, 2013 WL 6804259.

EBSA FORM 700 – CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf to the organization	
Mailing and email addresses and phone	

number for the individual listed above	

I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)) that has a religious objection to providing coverage for some or all of any contraceptive services that would otherwise be required to be covered.

Note: An organization that offers coverage through the same group health plan as a religious employer (as defined in 45 CFR 147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815 2713(a)(1)(iv) or 29 CFR 2590.715- 2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible

organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210–0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is

estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N–5718, Washington, DC 20210 or emailebsa.opr@dol .gov and reference the OMB Control Number 12100150.

Little Sisters et al. v. Burwell, Nos. 13-1540, 14-6026, 14-6028

BALDOCK, Circuit Judge, dissenting in part.

Today the Court holds, among other things, that the ACA contraceptive Mandate's accommodation scheme does not substantially burden religious non-profits that object to facilitating contraceptive or abortifacient coverage because opting out does not cause, authorize, or otherwise facilitate such coverage.[56] The Court's opinion provides perhaps the most thorough explanation of the accommodation scheme's nuanced mechanics that I have yet read. And for argument's sake, I follow its holding as to the *insured* plaintiffs' and *Little Sisters* plaintiffs' RFRA claims.[57] But I cannot join the Court's holding

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[56] For consistency, I adopt the Court's glossary.

[57] As I explain below, the *Little Sisters* plaintiffs, though self-insured, have not shown that their opting out will necessarily cause their plan participants and beneficiaries to receive

as to the other *self-insured* plaintiffs' RFRA claims, as that holding contradicts the Court's own reasoning and thorough explanation of the accommodation scheme.

In reality, the accommodation scheme forces the self-insured plaintiffs to perform an act that causes their beneficiaries to receive religiously objected-to coverage. The fines the government uses to compel this act thus impose a substantial burden on the self-insured plaintiffs' religious exercise. Moreover, less restrictive means exist to achieve the government's contraceptive coverage goals here. I must therefore dissent in part.

I. WHEN IS A BURDEN ON RELIGIOUS EXERCISE "SUBSTANTIAL?"

The first step of a RFRA claim requires plaintiffs to show (1) that the federal government has imposed a substantial burden on a(2) sincere (3) exercise of religion. *See* 42 U.S.C. § 2000bb–1(a). The unique threshold question we and so many other courts are currently grappling with, however, is how to determine whether a substantial burden exists where a law compels religious adherents to perform an act they sincerely oppose when this opposition might be based on a faulty understanding of the law. *See, e.g., E. Tex. Baptist Univ. v. Burwell*, 2015 WL 3852811, at *3 (5th Cir. June 22, 2015).

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contraceptive coverage. Accordingly, my use of the term "self-insured plaintiffs" does not refer to the Little Sisters unless otherwise stated.

Several learned judges have argued compellingly that, under *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), the amount of coercion the government uses to force a religious adherent to perform an act she sincerely believes is inconsistent with her understanding of her religion's requirements is the only consideration relevant to whether a burden is "substantial" under RFRA. *See, e.g., Priests For Life v. U.S. Dep't of Health & Human Servs.*, No. 13–5368, slip op. at 17–22 (D.C.Cir. May 20, 2015) (Brown, J., dissenting from the denial of rehearing en banc); *id.* at 35 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 628 (7th Cir.2015) (Flaum, J., dissenting); *Eternal Word Television Network, Inc. v. Sec'y, Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340 (11th Cir.2014) (Pryor, J. specially concurring); *see also Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir.2013) ("Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."); *cf. E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2031–33 (2015) (analyzing a plaintiff's exercise as a "religious practice" under Title VII where the act was motivated by "her understanding of her religion's requirements").

These judges assert that whether religious objectors properly understand the legal significance of the compelled act has no bearing on the substantial burden analysis. *E.g. Priests For Life .*, No. 13–5368, slip op. at 35 (Kavanaugh, J.,

dissenting) ("But what if the religious organizations are misguided in thinking that this scheme ... makes them complicit in facilitating contraception or abortion? That is not our call to make under the first prong of RFRA."). And *Hobby Lobby* supports this position well, as questioning a religious adherent's understanding of the significance of a compelled action comes dangerously close to questioning "whether the religious belief asserted in a RFRA case is reasonable"—a "question that the federal courts have no business addressing."*Hobby Lobby*, 134 S.Ct. at 2778.

Under this understanding of RFRA, the accommodation scheme substantially burdens any religious non-profit that objects to performing an act that would cause or otherwise make it complicit in providing contraceptive coverage simply because the scheme uses substantial fines to compel an act that the non-profit sincerely believes would have that effect. The actual legal significance of the compelled act is irrelevant to the substantial burden analysis. And because the government has conceded (2) the sincerity of (3) the religious exercise at issue, the only issue left to address is whether the government has shown that the accommodation scheme survives strict scrutiny. The judges who take this position, so far, all agree that the government has not made this showing.*Priests For Life.*, No. 13–5368, slip op. at 22–25 (Brown, J., dissenting); *id.* at 46–51 (Kavanaugh, J., dissenting); *Notre Dame*, 786 F.3d at 629–30 (Flaum, J., dissenting); *Eternal Word Television Network*, 756 F.3d at 1348–49 (Pryor, J. specially concurring).

Notwithstanding the strength of those positions, I will proceed under the following assumptions to highlight an even deeper problem lurking within the self-insured accommodation scheme: First, I will assume that whether a burden on religious exercise is "substantial" turns not only on the amount of coercion the government uses to compel an act (no one disputes the substantiality of the fines at issue here), but also on "how the law or policy being challenged actually operates and affects religious exercise."Slip Op. at 39. Second, I will assume this Court may tell a religious adherent she does not face a substantial burden on her religious exercise if her understanding of the law is flawed. Third, I will assume that any burden the accommodation scheme imposes on Plaintiffs—who object to performing any act that would cause or otherwise make them complicit in providing various forms of contraceptive coverage—cannot be substantial unless they show, for example, how their compelled act causes that coverage. *See* Slip Op. at 45–66.

The Court tells Plaintiffs they cannot make this showing "because opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage."Slip Op. at 65. If showing this causation is a prerequisite to establishing a substantial burden, the Court properly rejects the *insured* plaintiffs' RFRA claim, as their action or inaction will not affect whether their plan beneficiaries receive objected-to coverage. But the *self-insured* plaintiffs' inaction will prevent their plan beneficiaries from receiving the coverage. If their beneficiaries receive this coverage, it is only because the self-insured plaintiffs, by opting out,

*caused that effect.*Thus, the self-insured plaintiffs have shown how their opting out would cause the provision and receipt of objected-to coverage and established a substantial burden on their religious exercise.

II. THE CRITICAL DISTINCTION IN THIS CASE

I have nothing to add to the Court's summary of the background in these cases, and very little to add to its explanation of the detailed mechanics of the ACA accommodation scheme. But a critical distinction within scheme bears repeating. Under the ACA accommodation scheme, in the *insured* health plan context, "a health insurance issuer ... would be obligated to provide contraceptive coverage under the ACA whether or not [the insured non-profit] delivered the Form or notification to HHS." Slip Op. at 48 n.28 (citing 42 U.S.C. § 300gg–13). But in the *self-insured* context, a TPA would be "*authorized* and obligated to provide the coverage ...*only if* the religious non-profit ... opts out." Slip Op at 49 (emphases added); *see also*26 C.F.R. § 54.9815–2713AT(b)(2); 29 C.F.R. § 2590.715–2713A(b)(2).

The Fifth, Sixth, and Seventh Circuits failed to recognize this distinction. *See E. Tex. Baptist,* 2015 WL 3852811, at *5; *Notre Dame,* 789 F.3d at 614; *Mich. Catholic Conference & Catholic Family Servs. v. Burwell,* 755 F.3d 372, 387 (6th Cir.2014)*cert. granted, judgment vacated* 135 S.Ct. 1914 (2015). The Third and D.C. Circuits failed to appreciate its significance. *See Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 438 (3d

Cir.2015); *Priests For Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 254–56 (D.C.Cir.2014). This Court considers the distinction "unremarkable." Slip Op. at 49. I disagree. The distinction makes a difference, and juxtaposing the insured plaintiffs and self-insured plaintiffs forces that difference into bold relief.

A. The Insured Plaintiffs

Assuming causation is key, I agree the accommodation scheme does not substantially burden the *insured* plaintiffs' religious exercise. As the Court explains, even total inaction on the part of an insured non-profit still results in its plan participants and beneficiaries receiving the coverage to which they are entitled under the ACA because the government has independently obligated a third party (insurance issuers) to provide it.[58] *See* Slip Op. at 46–47. Opting out in the insured context does not cause the receipt of contraceptive coverage; rather, it merely absolves the eligible insured nonprofit of any responsibility for the contraceptive coverage its plan participants and beneficiaries will receive *whether it opts out or not.*Thus, assuming Plaintiffs must show how opting out causes coverage, the accommodation scheme does not substantially burden the *insured*

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[58] Even the government's proffered fourth option—declining to sponsor a group health plan—would not interfere with contraceptive coverage for the insured plaintiffs' plan beneficiaries. Without an employer-sponsored plan, these beneficiaries would have to find other health insurance. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2664 (2012) (Scalia, J., dissenting). And that insurance would likely cover contraceptives. *See*42 U.S.C. § 300gg–13.

plaintiffs' exercise of religion. The insured accommodation is more akin to traditional conscientious objector schemes: the government can and will conscript the actors it needs to achieve its goals whether objectors opt out or not.

The same cannot be said of the self-insured plaintiffs, however.

B. The Self-Insured Plaintiffs

Unlike the *insured* plaintiffs, the ACA leaves the *self-insured* plaintiffs in a position where, by refusing to opt out, they can prevent their plan beneficiaries from receiving the objected-to coverage the beneficiaries are entitled to and would otherwise receive under the ACA. In other words, their plan participants and beneficiaries will receive the coverage *only if* they opt out as the government commands. This makes their opting out a but-for cause of the receipt of the coverage.

The Court views this ability to prevent contraceptive coverage by inaction as nothing more than the ability to disobey the law. *See* Slip Op. at 54–55 & n.35. But that is the same limited ability the plaintiffs in *Hobby Lobby* possessed, and it goes to the heart of the substantial burden the self-insured plaintiffs face here. "In *Hobby Lobby,* the plaintiff[s] ... could choose only between (1) complying with the ACA by providing the coverage or (2) not complying and paying significant penalties."Slip Op. at 3 (citing *Hobby Lobby,* 134 S.Ct. at 2759–60). Similarly, these self-insured plaintiffs must choose between (1) complying with

the ACA by taking an action that ultimately causes their beneficiaries to receive this coverage or (2) not complying and paying significant penalties. This is a Hobson's choice, which we have long held imposes a substantial burden under RFRA. *See Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1315 (10th Cir.2010) ("We conclude that a religious exercise is substantially burdened under [RFRA] 42 U.S.C. § 2000cc–1(a) when a government ... presents the plaintiff with a Hobson's choice-an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief."); *Hobby Lobby,* 723 F.3d at 1141 (10th Cir.2013) (explaining that the choice between compromising religious beliefs and paying fines under the ACA "is precisely the sort of Hobson's choice described in *Abdulhaseeb* ").

1. The Obvious Causal Connection

If causation is key to showing a substantial burden, *see* Slip Op. at 32–33, 45–66, the self-insured plaintiffs have surely shown that burden. Certainly, a shifting legal responsibility alone may not necessarily create a causal relationship. But here, the self-insured plaintiffs' opt out causes the coverage because (1) the government cannot force plaintiffs themselves to provide the coverage, *Hobby Lobby,* 134 S.Ct. at 2785, and (2) the government cannot shift the ability (let alone the responsibility) to provide the coverage to non-objectors unless the self-insured plaintiffs opt out. *See* 29 C.F.R. § 2590.715–2713A(b)(2); Slip Op. at 48–49. Opting out is thus the only way their plan participants and beneficiaries may receive the coverage.

Put another way, if the self-insured plaintiffs do not opt out, who will provide the coverage for their plan participants and beneficiaries? The answer: no one. The self-insured plaintiffs cannot do so per their faith; the TPAs cannot do so per the law. Thus, the self-insured accommodation renders any duty to provide, and any entitlement to receive, contraceptive coverage wholly unenforceable and thus illusory—unless and until the self-insured plaintiffs opt out. *Cf. Pennington v. Northrop Grumman Space & Mission Sys. Corp.*, 269 F. App'x 812, 819 (10th Cir.2008) (unpublished) ("[W]hen a promise, in reality, promises nothing—it is illusory."(Internal marks and citation omitted)).

To fully understand why no one can or will provide this objected-to coverage unless the self-insured plaintiffs perform a compelled act, one must view the ACA Mandate and accommodation scheme in light of *Hobby Lobby*. *Hobby Lobby* clearly holds forcing religious employers to provide objected-to contraceptive coverage violates RFRA. 134 S.Ct. at 2785. So, if any entity is to provide the coverage, it must be a third party. The *insured* accommodation independently conscripts third parties to provide the coverage. But as this Court points out, the *self-insured* accommodation was drafted such that no third party can provide the coverage in the self-insured context unless and until the objecting religious employer opts out. Slip Op. at 48–49; *see also Eternal Word Television Network*, 756 F.3d at 1347 (Pryor, J., specially concurring) (explaining that, without the Form or letter, a TPA "has no legal authority to step into the shoes of the [non-profit] and provide contraceptive coverage to the employees

and beneficiaries of the [non-profit]"). As such, a third party's legal authority (*i.e.* permission) to provide the coverage is wholly dependent upon (*i.e.* caused by) the self-insured non-profit opting out.

The Court believes we should focus on the fact that the ACA "entitle[s] plan participants and beneficiaries to coverage whether or not the plaintiffs opt out" and imposes a duty on "either the religious non-profit organization or the TPA" to provide that coverage. Slip Op. at 33, 57. But this reasoning (1) fails to consider the ACA Mandate in light of the limitations *Hobby Lobby* already imposed, and (2) confuses legal concepts (duty and entitlement) with real-world effects (provision and receipt).

First, the Court's focus on the ACA's requirement that "either the religious non-profit organization or the TPA" provide the coverage, Slip Op. at 57, ignores the fact that the government cannot require the religious non-profit to provide the coverage under *Hobby Lobby*. By ignoring the limitation *Hobby Lobby* imposes on the government, the Court simultaneously acknowledges that "opting out is necessarily a but-for cause of someone else—the TPA—providing contraceptive coverage," Slip Op. at 56, and nevertheless rejects the self-insured plaintiffs' RFRA claims for lack of causation. Slip Op. at 64–65. But again, *Hobby Lobby* forbids the government from placing this requirement on the non-profits themselves. So if opting out is necessarily a but-for cause of someone else providing the coverage, it is necessarily a but-for cause of anyone providing the coverage *at all*. Essentially, the Court

concedes but-for cause and then turns around and denies the existence of any causation. What?

Second, the Court asserts that the self-insured plaintiffs' opt out will not cause the actual provision and receipt of objected-to coverage because the ACA creates an independent, albeit illusory, duty and entitlement related to that coverage. True, opting out does not cause *entitlement* to contraceptive coverage—the ACA entitles all health plan beneficiaries to contraceptive coverage. But these beneficiaries will not *receive* that coverage unless the self-insured plaintiffs do something to cause its provision from a third party. In other words, the ACA may independently say "someone" has a *duty* to provide contraceptive coverage, *see* 29 C.F.R. § 2590.715–2713, but no one can or will honor that duty and *provide* the coverage unless the self-insured plaintiffs opt out. No self-insured plaintiff will honor it because the government cannot force them to under *Hobby Lobby*, and no third party can honor it because no third party has authority to do so without an opt out. Based on this error, the Court concludes that "federal law, not the actions of the religious objector, ensures that plan participants and beneficiaries will *receive* contraceptive coverage."Slip Op. at 52 (emphasis added). But that is simply wrong. As explained above, federal law alone does not ensure receipt of the coverage from the self-insured plaintiffs; and it does not even allow, let alone ensure, receipt of that coverage from a third party unless the self-insured plaintiffs opt out. Rather, federal law, *only in conjunction with the self-*

insured plaintiffs' opt out, allows plan participants and beneficiaries to receive contraceptive coverage.[59]

These errors, taken together, cause the Court to reject a straw man rather than the self-insured plaintiffs' RFRA claims. The self-insured plaintiffs do not claim a RFRA violation based on the fact that the ACA created an entitlement to contraceptive coverage; they object to the causal role they must play in providing that coverage.[60]

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[59] Even with the opt-out, federal law does not always *ensure* receipt of the coverage. For example, the Court asserts "the ACA ensures plan participants and beneficiaries will *receive* contraceptive coverage" but simultaneously contradicts itself by acknowledging that TPAs for self-insured church plans may in fact decline to *provide* that coverage, in which case "plan participants and beneficiaries would not get the coverage to which they are otherwise entitled."Slip Op. at 61 & n.41 (emphases added).

The Court's attempt to paint these contradictory positions as consistent suffers from the same logical flaw highlighted above; that is, it confuses the actual *provision* and *receipt* of coverage with a concededly unenforceable *entitlement* and *duty* to provide it. If the law cannot force an unwilling TPA to provide contraceptive coverage, the TPA will not provide it, and the plan beneficiaries will not receive it. *Cf. Mach Mining, LLC v. E .E.O.C.*, 135 S.Ct. 1645, 1652–53 (2015) (acknowledging that even the government may violate the law, "especially so when [it faces] no consequence"). Thus, the existence of an unenforceable duty to provide contraceptive coverage does not ensure receipt, as this Court seems to believe.

[60] The Court also asserts that religious non-profits "cannot preclude the government from requiring others to provide the legally required coverage in its stead," Slip Op. at 51–52, and "cannot hamstring government efforts to ensure that plan participants and beneficiaries receive the coverage to which they are entitled under the ACA," Slip Op. at 71. I agree that

A proper accommodation may relieve otherwise substantial burdens on religious exercise, but this accommodation fails to do so, at least in the self-insured context. And to be sure, "[a] burden does not rise to the level of being substantial when it places an inconsequential or de minimis burden on an adherent's religious exercise."Slip Op. at 41 (quoting *Priests for Life*, 772 F.3d at 246). But here, the accommodation scheme foists upon the self-insured plaintiffs a choice with dire consequences. Either (1) they refuse to act, which would avoid causing their plan beneficiaries to receive objected-to coverage but trigger crippling fines for violating the law or (2) they act, which would cause the receipt of this coverage and violate their faith. If "the purpose of religious accommodation" was to permit religious objectors "to avoid a religious burden and to comply with the law," *see* Slip Op. at 55, it fails to achieve that purpose. Rather, the accommodation foists upon the self-insured plaintiffs a Hobson's choice and thus a substantial burden on their exercise of religion. *Abdulhaseeb*, 600 F.3d at 1315.

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this *should not* be the case but, unfortunately, the government drafted the self-insured accommodation such that the self-insured plaintiffs *can*, by inaction, do exactly that. As explained above, that is precisely why their opting out causes the receipt of objected-to coverage.

Moreover, to the extent this language connotes dissatisfaction with the problems created by the self-insured accommodation, such dissatisfaction is irrelevant to whether the law imposes a substantial burden under RFRA. Our job is not to "add words to the law to produce what is thought to be a desirable result."*Abercrombie & Fitch*, 135 S.Ct. at 2033.

2. This is Not a Conscientious Objector Accommodation Scheme

The Court believes this accommodation scheme akin to the conscientious objector schemes used for military conscription. *See* Slip Op. at 52 n.33. Not so. The accommodation scheme may *function* like a conscientious objector scheme in some regards, but it ultimately forces objectors to play a very different and causal role.

Military conscription law generally requires male citizens to register for the draft and allows the President to draft a certain number of men from that pool of candidates into active duty in the Armed Forces.[61] *See, e.g., Arver v. United States*, 245 U.S. 366, 375–76, 38 S.Ct. 159, 62 L.Ed. 349 (1918) (allowing the President to draft up to two groups of 500,000 men). After registering, conscientious objectors can opt out of serving in combat. 50 App. U.S.C. § 456(j). But they cannot reduce the number of men the President ultimately drafts. Whether objectors lawfully register and opt out, or register and then choose unlawfully to avoid induction, or even choose unlawfully not to register at all, the President can and will draft the same number of men needed for war. *See* LAWRENCE M. BASKIR & WILLIAM A. STRAUSS, CHANCE AND CIRCUMSTANCE: THE DRAFT, THE WAR, AND THE VIETNAM GENERATION 14–28 (1978)

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[61] Currently, "every male citizen of the United States . . . between the ages of eighteen and twenty-six" must register in order to facilitate any eventual conscription into the Armed Forces. 50 App. U.S.C. § 453(a).

(explaining that the government's Vietnam draft policies "did not care who was drafted as long as enough people were drafted").

Indeed, the Court's reliance on *Sheridan v. United States,* 483 F.2d 169 (8th Cir.1973), highlights this difference. In *Sheridan,* the defendant registered for the draft but did not lawfully opt out. Instead, he simply refused to be inducted. *Id.* at 170. But the result under conscription law was the same: "another person [was] called in his place."*Id.* at 174. In other words, like the *insured* plaintiffs, no matter what conscientious objectors do or refuse to do, the government can and will achieve its military draft goals.

The opposite result occurs under the self-insured accommodation scheme. If a *self-insured* plaintiff simply refuses to provide coverage and does not opt out, the government cannot call a third party in its place. The accommodation scheme thus places the self-insured plaintiffs in a very different position vis-à-vis helping the government achieve its religiously objectionable goals. Conscientious objectors cannot prevent the government from conscripting their replacements; but the self-insured plaintiffs can *completely* prevent the government from even authorizing their TPAs to provide objected-to coverage. Conscientious objectors also need not identify a related third party to serve in their stead; but the self-insured plaintiffs must identify a related third party through a form or letter. And this form or letter is the *only means* by which the government can authorize that third party to serve in their stead.

Under conscientious objector schemes, the government may independently draft non-objecting Americans into combat to further its war efforts; conscientious objectors have no power to stop it. But under the self-insured accommodation scheme the government needs the self-insured plaintiffs to commit an act to further its contraceptive coverage efforts; their beneficiaries will not receive this coverage unless they commit that act and cause that result. Such a conscientious objector scheme—where the government could draft a replacement soldier *only if* the initial conscientious objector opted out *and* identified a previously ineligible relative to serve in his stead—would be immensely problematic, to say the least.[62]

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[62] The Court attempts to counter this point by referencing the Enrollment Act of 1863, which "permitted a draftee to avoid service only by either providing a substitute or paying $300."Slip Op. at 52 n.33 (quoting Act of March 3, 1863, ch. 75, § 13, 12 Stat. 731, 733 (1863)). But this act was a short-lived experiment that did not even survive to the end of that war. Moreover, resentment over the Enrollment Act and its opt-out provision triggered the "New York City draft riot, the largest [and deadliest] civil insurrection in American history apart from the South's rebellion itself."ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877 at 32 (1988). "No case questioning the Civil War draft was heard by the Supreme Court, but it is known that Chief Justice Roger Taney prepared a rough outline of an opinion declaring the act unconstitutional."Leon Friedman, *Conscription and the Constitution*, 67 MICH. L.REV. 1493, 1546 (1969). Indeed, one eminent historian called the substitution provision a "grotesque monstrosit[y]" and stated "[t]he government could hardly have devised a worse law."BRUCE CATTON, THE CIVIL WAR 208 (1987). I would call that problematic.

In relying on conscientious objector schemes the Court commits the same error it levies against this dissent: it fails to appreciate the broader structures of both the accommodation and conscientious objector schemes. In comparing the two schemes, the Court focuses only on the acts the objector must perform to opt out, and what happens if the objector performs those acts. The comparison totally ignores the broader and more critical difference between the two schemes: what happens if the objector refuses to perform those acts? Conscription law requires that "someone" go to war, and in the end "someone" *will* go to war. The law is such that the government can and will shift this legal duty to a non-objector regardless of the objector's action or inaction. Conversely, the ACA says "someone" must provide contraceptive coverage, but the self-insured accommodation was drafted such that if the self-insured plaintiffs choose to do nothing rather than opt out, no one will actually provide that coverage. Again, the government cannot force the plaintiffs to provide the coverage, and it cannot shift the duty to provide the coverage unless the self-insured plaintiffs choose to opt out. If the government could independently shift this duty (as conscription law allows) or eliminate the need to shift the duty at all (as the insured accommodation does) that might eliminate the causal role the self-insured plaintiffs currently face. But presently, the law forces the self-insured plaintiffs into gatekeeping positions and then uses fines to force them to open the gates.

3. The Supreme Court's *Little Sisters* and *Wheaton College* Orders

The Court also believes the accommodation scheme does not impose a substantial burden on self-insured non-profits because the government's new alternative notice accommodation—which forces an objecting non-profit to write a letter to HHS opting out and identifying its TPAs and/or health insurance issuers—is essentially akin to the Supreme Court's injunctions pending appeal in *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, 134 S.Ct. 1022 (2014), *Wheaton College v. Burwell*, 134 S.Ct. 2806 (2014), and most recently *Zubik v. Burwell*, Nos. 14A1065, 14–1418, 2015 WL 3947586, at *1 (U.S. June 29, 2015).*See* Slip Op. at 42 n.25, 59 n.39. But the Court's reliance on these interim orders appears to be based on two flawed assumptions: (1) that the notices required by these orders were sufficient to authorize a TPA to provide coverage it could not provide before, and (2) even assuming this dubious interpretation of the orders, that they approved of compelling religious non-profits to play this causal role under RFRA's first step (no substantial burden) as opposed to approving of such compulsion only where it satisfies RFRA's second step (strict scrutiny).

As to the first assumption, the *Little Sisters* order nowhere contemplates allowing the government to use the Little Sisters' interim written notice to facilitate coverage by alternative means. And the *Wheaton College* order did not allow the government to rely on Wheaton's interim written notice, either. Rather, it allowed the government to

rely on preexisting knowledge that Wheaton qualified for exemption and would not provide certain contraceptive coverage. *See Wheaton Coll.*, 134 S.Ct. at 2807 ("But [Wheaton] *has already notified the Government*—without using EBSA Form 700—that it meets the requirements for exemption from the contraceptive coverage requirement on religious grounds. Nothing in this order precludes the Government from relying on *this notice*, to the extent it considers it necessary, to facilitate the provision of full contraceptive coverage under the Act."(emphases added)). Moreover, as Justice Sotomayor's dissent in *Wheaton College* shows, the written notices required in *Wheaton College*, *Little Sisters*, and *Zubik* were insufficient to authorize TPA coverage under the then-effective accommodation, and may remain insufficient even under the new alternative accommodation. *See Wheaton Coll.*, 134 S.Ct. at 2814 n. 6 (Sotomayor, J., dissenting).[63]

To the extent *Wheaton College* allows the government to rely on its knowledge of Wheaton's objection, this merely tracks the Supreme Court's

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[63] That is, even under the new alternative notice scheme, the "information necessary to verify applicants' eligibility under 26 CFR § 54.9815–2713A(a),"*see Zubik*, 2015 WL 3947586, at *1, does not contain all the information required by the regulations and thus might not qualify as a valid opt out sufficient to trigger TPA coverage, *see* 29 C.F.R. § 2590.715–2713A(b)(1)(ii)(B) (requiring the self-insured organization to provide, among other things "the plan name and type ... and the name and contact information for any of the plan's third party administrators"); *Wheaton Coll.*, 134 S.Ct. at 2814 n. 6 (Sotomayor, J., dissenting).

decision in *Bowen v. Roy*, where the Court rejected a Free Exercise challenge to the government's *use* of a social security number it *already possessed* and concluded that the First Amendment does not "require the government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens."476 U.S. at 693, 699 (1986). But importantly:

> a majority of justices [in *Roy*] indicated that the requirement that applicants *furnish* a social security number was a different matter. Five justices either concluded or strongly suggested that the government could not require an applicant to provide the number on a benefits application if the applicant had a sincere religious objection to doing so.

Univ. of Notre Dame v. Sebelius, 743 F.3d 547, 567 (7th Cir.2014) (Flaum, J., dissenting) (emphasis in original), *cert. granted, judgment vacated sub nom. Univ. of Notre Dame v. Burwell*, 135 S.Ct. 1528, 191 L.Ed.2d 557 (2015); *see Roy*, 476 U.S. at 714–16 (Blackmun, J ., concurring in part), 732 (O'Connor, J., concurring in part and dissenting in part) ("The rise of the welfare state was not the fall of the Free Exercise Clause."), 733 (White, J., dissenting).

Moreover, the Court may well have expressly allowed for this reliance in *Wheaton College* because, unlike the Little Sisters, Wheaton provides insurance through both self-insured plans *and* insured plans subject to the Mandate. *See Wheaton Coll. v. Burwell*, 50 F.Supp.3d 939, 944

(N.D.Ill.2014) (Wheaton "offers its health insurance pursuant to six plans: two insured HMO plans, a [grandfathered] PPO plan, two self-funded prescription drug plans, and an insured student health plan."(footnote omitted)). Thus, unlike the wholly self-insured Little Sisters, the government might independently ensure that an issuer from at least one of these insured health plans provides full contraceptive coverage to at least some of Wheaton's various plan beneficiaries under the current ACA regime without forcing Wheaton to play a causal role in the receipt of that coverage.

Thus, the *Little Sisters, Wheaton College,* and *Zubik* orders allow religious non-profits to simply notify the government that they qualify for exemption and will not provide contraceptive coverage. The government may use its knowledge of these objections when choosing between *independently* available alternative means to ensure coverage is provided (as the conscientious objector and *insured* schemes do). But these orders do not allow the government to compel religious non-profits to furnish the document that is essential to cause their plan beneficiaries to receive objected-to coverage.

And yet, suppose these orders could be read to say that the written notices they required were legally sufficient to authorize a previously ineligible TPA to provide objected-to coverage. Under that dubious interpretation, the orders would indeed force self-insured religious objectors to perform an act that causes the ultimate provision of the coverage, as they would make the provision of the

coverage wholly contingent upon the religious objectors' acts of providing HHS with that notice. For all the reasons discussed above, that interpretation of the orders would impose a substantial burden on the self-insured plaintiffs' exercise of religion.

So, turning to the Court's second assumption, even under its dubious interpretation of the orders, the orders nowhere say that forcing religious non-profits to play this sort of causal role avoids imposing a substantial burden on their religious exercise. Instead, assuming the Court's interpretation of these orders is correct, these orders would impose a substantial burden under RFRA's first step and therefore must comply with RFRA's second step (strict scrutiny). Indeed, Judge Kavanaugh has compellingly argued that these orders simply set forth a less restrictive means of achieving the government's compelling interest in facilitating access to contraceptive coverage. *See Priests For Life,* No. 13–5368, slip op. at 46–51 (Kavanaugh, J., dissenting). These orders do not require religious non-profits to identify related third parties for the government to authorize and possibly conscript in their stead. Rather, they only require the non-profits to inform HHS that they qualify for exemption and will not provide objected-to coverage. As discussed above regarding conscientious objector schemes, a significant difference exists between asking a religious objector to say simply "no" and

compelling that objector to identify a related entity to serve as a scapegoat where no one else can.[64]

4. *ERISA-Bound Plans v. ERISA-Exempt Church Plans*

The burden the self-insured plaintiffs face is most salient with regards to Southern Nazarene, whose TPA is subject to ERISA enforcement and therefore will be not only authorized but also required to provide contraceptives to the participants and beneficiaries of Southern Nazarene's self-insured plan *only if* Southern Nazarene opts out. *See* 29 C.F.R. § 2590.715–2713A(b)(2). Southern Nazarene's opt out will thus clearly cause someone to provide contraceptive coverage where no one would or could before.

But the lack of an enforcement mechanism as to ERISA-exempt church plans does not itself remove the causal role and substantial burden that the accommodation scheme foists upon the church-plan plaintiffs. For example, the Guidestone Plan is an ERISA-exempt church plan, but at least one of its TPAs, Highmark, has indicated it will provide full contraceptive coverage for those self-insured organizations that use the Guidestone Plan and validly opt out. And plaintiffs Reaching Souls, Truett–McConnell College, and Mid–America Christian University are all self-insured plaintiffs that use the Guidestone Plan. Slip Op. at 21; SN

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[64] Moreover, this less restrictive means of achieving the same goal necessarily dooms the current self-insured accommodation scheme under strict scrutiny. *See infra* Part III.

Supp. Br. II at 9 n.2. So even though their opting out might not trigger an *enforceable* duty to provide objected-to coverage, these church plan plaintiffs have established that their opting out will actually cause Highmark to provide the coverage—coverage it cannot provide unless they opt out.

True, given the repeal of the accommodation scheme's non-interference provision, church plans like the Guidestone Plan might try to fire TPAs like Highmark and replace them with TPAs that promise not to provide coverage for objected-to contraceptives, and those plaintiffs that use the Guidestone Plan might be able to fire Guidestone if it refuses to do so. *See* RS Oral at 12:57–13:10. Thus, by economic coercion, these plaintiffs might be able to ultimately stop the provision of the coverage they were initially forced to cause. But, the government maintains that "such conduct is generally unlawful and is prohibited under ... state and federal laws."*See* 79 Fed.Reg. at 51,095. And none of this changes the present fact that if plaintiffs who use the Guidestone Plan opt out, they will cause Highmark to perform a religiously objected-to act on their behalf where Highmark previously could not do so. Thus, those self-insured plaintiffs that use the Guidestone Plan have shown "presently threatened injuries" warranting injunctive relief. *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931).

The *Little Sisters* plaintiffs, on the other hand, have not established this causal connection. The Little Sisters' primary TPA, Brothers Services, is not bound by ERISA and has promised not to provide contraceptive coverage even if Little Sisters opts out.

Little Sisters asserts that Brothers Trust also uses other TPAs who might choose to provide contraceptive coverage if they opt out, but they have not sufficiently developed this theory to bear the burden of establishing that their opting out will presently cause someone to provide contraceptive coverage to their plan beneficiaries.

The Court also suggests self-insured non-profits "could relieve themselves of any lingering doubts they may have about causation by [1] employing an insured plan, [2] employing a self-insured church plan where the Departments lack authority to enforce the Mandate against their TPA, or [3] administering the self-insured plan on their own in-house without using a TPA."Slip Op. at 52 n.32. But none of these options alleviate the substantial burden the accommodation scheme imposes. First, choosing to switch from a self-insured plan, where no coverage can be provided without an opt out, to an insured plan, where coverage will be provided by a third party, would simply mean choosing to cause that coverage by switching plans rather than opting out. Second, as discussed above, even in the church plan context, opting out may still cause a TPA to provide the coverage. Third, no plaintiff in this case administers its plan in-house. So to the extent the Court opines on the legal effect the ACA Mandate might have on a plan not at issue in this case, the Court impermissibly exceeds its jurisdiction by "advising what the law would be upon a hypothetical state of facts."*Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

Given that we do not have jurisdiction to pass on this hypothetical, the self-insured plaintiffs should not have to rebut it to prove a present substantial burden under RFRA. But, because the Court goes there, administering a self-insured plan in-house without a TPA can be prohibitively complex, limit options for managing care, and create legal pitfalls that many non-profits simply cannot afford to handle. *See* Thomas R. McLean & Edward P. Richards, *Health Care's "Thirty Years War": The Origins and Dissolution of Managed Care*, 60 N.Y.U. ANN. SURV. AM.. L. 283, 313 (2004); *see generally* Rhonda D. Orin and Daniel J. Healy, *Self-Administering, Insuring and Funding Benefit Plans*, 197–213 in HUMAN RESOURCES (Thompson 2007 Summer Edition).

C. Summing Up the Substantial Burden On the Self-Insured Plaintiffs

The Court concludes that the Plaintiffs' causation arguments fail because "opting out would not trigger, incentivize, or otherwise cause the provision of contraceptive coverage."Slip Op. at 65–66. This conclusion is correct in the *insured* context. But the *self-insured* plaintiffs, with the exception of Little Sisters, have shown exactly how their act of opting out will cause someone to provide contraceptive coverage where their refusal to act would prevent that result. Unfortunately, the Court fails to see this obvious causal relationship because it ignores the clear holding of *Hobby Lobby* and fails to comprehend the difference between unenforceable entitlement and actual receipt. The government has left self-insured plaintiffs in a position where they

must decide whether their beneficiaries will actually *receive* objected-to contraceptive coverage. The accommodation does not absolve these plaintiffs of this responsibility. Instead, it forces them to either (1) violate their sincere religious beliefs by performing an action that will cause their beneficiaries to receive objected-to coverage, or (2) violate the law and incur steep fines to obey those religious beliefs. Again, this is a Hobson's choice and thus a substantial burden on their religious exercise under RFRA. *Abdulhaseeb*, 600 F.3d at 1317; *Hobby Lobby*, 723 F.3d at 1141.

III. STRICT SCRUTINY

Because the government has imposed a substantial burden on at least the self-insured plaintiffs' religious exercise, under RFRA it must demonstrate that this burden is "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."42 U.S .C. § 2000bb–1. Our precedent currently holds the government has no compelling interest in contraceptive coverage. *See Hobby Lobby*, 723 F.3d at 1143. But even assuming such a compelling interest, *see Hobby Lobby*, 134 S.Ct. at 2780 (assuming the same), 2785–86 (Kennedy, J., concurring), 2799 (Ginsburg, J., dissenting), the government cannot show this scheme is the least restrictive means of furthering that interest. As discussed above, the Supreme Court's interim orders in *Little Sisters*, *Wheaton College*, and *Zubik*, even when interpreted so as to force self-insured non-profits to play a necessary causal role in contraceptive coverage, provide a less

restrictive means of achieving the same goal. *See Priests For Life*, No. 13–5368, slip op. at 46–51 (Kavanaugh, J., dissenting). The existence of this less restrictive means dooms the current accommodation scheme under strict scrutiny. *Hobby Lobby*, 134 S.Ct. at 2781–82.

IV. CONCLUSION

"Congress enacted RFRA in 1993 in order to provide very broad protection for religious liberty," *Hobby Lobby*, 134 S.Ct. at 2760, a liberty essential to our country's constitutional tradition, albeit with boundaries difficult to define, *see id.* at 2785 (Kennedy, J., concurring). The Court today makes causation one of those boundaries. Even assuming this boundary, however, the self-insured plaintiffs in this case, with the exception of the *Little Sisters* plaintiffs, have clearly shown how their compelled act will cause their plan beneficiaries to receive objected-to coverage that they could not otherwise receive. Therefore, I dissent from the Court's holding regarding these self-insured plaintiffs. Even assuming a causation requirement, I would still hold these self-insured plaintiffs have shown a substantial likelihood of success on the merits of their RFRA claim and that the other requirements for a preliminary injunction are met. I would therefore affirm the district court's denial of a preliminary injunction in *Little Sisters*, 6 F.Supp.3d 1225, affirm the district court's grant of a preliminary injunction in *Reaching Souls*,2013 WL 6804259, and affirm in part (as to the self-insured plaintiffs: Southern Nazarene University and Mid–America University) and reverse in part (as to the

insured plaintiffs: Oklahoma Baptist University and Oklahoma Wesleyan University) the district court's grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERISTY; OLAHOMA BAPTIST UNIVERSITY; and MID-AMERICA UNIVERSITY,	)	
Plaintiffs,	)	
-vs-	)	Case No. CIV-13-1015-F
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

The plaintiffs, Southern Nazarene University, Oklahoma Wesleyan University, Oklahoma Baptist University, and Mid–America University, have brought this action against Kathleen Sebelius, Secretary of the United States Department of Health

and Human Services ("HHS"), and other government officials and agencies, challenging regulations issued under the Patient Protection and Affordable Care Act, Pub.L. No. 111–148, 124 Stat. 119 (2010), as amended by the Heath Care and Education Reconciliation Act, Publ. L. No. 111–152, 124 Stat. 1029 (2010) ("ACA"). The matter is now before the court on plaintiffs' motion for a preliminary injunction. Doc. no. 19, filed on November 27, 2013 (Motion). Defendants have responded to the motion. Doc. no. 25. Although the complaint asserts both constitutional and statutory violations, the Motion invokes only the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*

I. Facts

The parties, at the invitation of the court, have entered into a stipulation as to the facts to be considered by the court for purposes of ruling on the motion for preliminary injunction. Doc. no. 43, filed on December 21, 2013 (herein: Stipulation).

The stipulated facts, which form the factual basis for the court's analysis and conclusions, are as follows:

1. Plaintiffs Southern Nazarene University (SNU), Oklahoma Wesleyan University (OKWU), Oklahoma Baptist University (OBU), and Mid–America Christian University (MACU) (collectively. "the Universities") are Christ-centered institutions of higher learning.

2. The Universities hold, as a matter of sincere religious conviction, that it would be sinful and immoral for them to participate in, pay for, facilitate, enable, or otherwise support access to Plan B, ella, and IUDs, and related counseling.

3. The Universities believe that Plan B, ella, and IUDs can and sometimes do act abortifaciently by preventing implantation after fertilization.

4. They hold that one of the prohibitions of the Ten Commandments ("thou shalt not murder") precludes them from facilitating, assisting in, or enabling the use of drugs or devices that they believe destroy very young human beings in the womb.

5. The Universities believe that their religious duties include promoting the physical well-being and health of their employees by providing them health insurance coverage.

6. OBU and SNU believe that their religious duties include promoting the physical well-being and health of their employees by offering them health insurance coverage.

7. SNU has approximately 505 employees, of which approximately 315 are full-time.

8. Approximately 253 SNU employees are enrolled in health insurance plans sponsored by the University. Approximately 249 dependents of employees are covered. The plans thus cover approximately 502 individuals.

9. SNU offers coverage through BlueCross BlueShield of Oklahoma. SNU offers beneficiaries two choices: "Blue Choice PPO—SNU Choice" and "Blue Choice PPO—SNU Premier."

10. SNU's health plan is partially self-insured. The university has contracted with an outside insurance company to pay all claims over $100,000.

11. The plan year for SNU's employee health insurance coverage begins on July 1 of each year.

12. SNU's employee health plans cover a variety of contraceptive methods. However, consistent with its religious commitments, SNU's contract for employee health coverage states that all drugs and devices that act after fertilization has occurred are excluded.

13. All SNU students enrolled in nine hours or more of classroom instruction are required to have health insurance.

14. SNU offers a health plan to those students who do not have health insurance coverage of their own.

15. The student plan excludes ella, Plan B, and IUDs.

16. The next student plan year begins on August 21, 2014.

17. Oklahoma Wesleyan University has approximately 557 employees, and about 112 of them are full-time.

18. OKWU provides two plans insured by Community Care of Oklahoma. One is an HMO benefit plan and the other is a PPO benefit plan.

19. Ninety-three employees are enrolled in the group health plans sponsored by OKWU. An additional 128 of these employees' dependents are covered, meaning that 221 individuals are covered by OKWU's group health plans.

20. Consistent with its religious commitments, the University's current contracts for employee health coverage exclude IUDs and emergency contraception.

21. The OKWU employee health plans do cover a variety of contraceptive methods.

22. The plan year for Oklahoma Wesleyan University's employee health insurance coverage begins on July 1 of each year.

23. OBU has approximately 328 employees, of whom about 269 are full time.

24. OBU provides eligible employees a PPO health plan with the choice of two networks provided by Blue Cross Blue Shield of Oklahoma.

25. Approximately 279 employees are covered by the plans. Approximately 696 dependents of employees are covered by the plans, bringing total coverage to 975 individuals.

26. Plan years for OBU's employee health plans begin on January 1 of each year.

27. The current OBU employee health plan excludes coverage of Plan B, ella, and IUDs.

28. All undergraduate and graduate students taking nine or more credit hours' worth of classes are eligible to enroll in a health plan facilitated by OBU.

29. The current OBU student health plan does not cover Plan B, ella, or IUDs. Case

30. A new OBU student plan is scheduled to go into effect on January 1, 2014.

31. MACU has approximately 298 employees, of whom about 139 are full time.

32. MACU's employee health plans cover approximately 100 employees.

33. The plan covers approximately 116 dependents of these employees.

34. MACU offers two traditional PPO plans: Health Choice 1000 and Health Choice 2000, both provided by GuideStone.

35. The plan year for MACU's employee health plan begins on January 1.

36. MACU's employee health plan does not cover Plan B, ella, or IUDs.

37. Prior to the promulgation of the challenged regulations, the Universities contracted with their health insurance issuers and third party

administrators not to provide or pay for the coverage to which the Universities object.

38. In March 2010, Congress passed, and President Obama signed, the Patient Protection and Affordable Care Act, Pub.L. No. 111–148 (March 23, 2010), and the Health Care and Education Reconciliation Act, Pub.L. No. 11 –152 (March 30, 2010), together known as the "Affordable Care Act" (ACA).

39. One ACA provision requires that any "group health plan" or "health insurance issuer offering group or individual health insurance coverage" provide coverage for certain preventive care services, including "[for] women, such additional preventive care and screenings ... as provided for in comprehensive guidelines supported by the Health Resources and Services Administration [(HRSA)]."42 U.S.C. § 300gg–13(a).

40. These services must be covered without "any cost sharing." 42 U.S.C. § 300gg–13(a).

41. Because there were no such existing HRSA guidelines relating to preventive care and screening for women, the Department of Health and Human Services (HHS) requested that the Institute of Medicine (IOM) develop recommendations to implement the requirement to provide coverage, without cost-sharing, of preventive services for women.

42. After conducting a review, IOM recommended that women's preventive services

include, among other things, "the full range of [FDA]-approved contraceptive methods, sterilization procedures, and patient education and counseling for women with reproductive capacity."

43. On August 1, 2011, HRSA adopted guidelines consistent with IOM's recommendations, subject to an exemption relating to certain religious employers authorized by regulations issued that same day.

44. Plan B, ella, and IUDs fall within the category of "FDA-approved contraceptive methods."

45. Defendants exempted certain religious employers from the regulations.

46. The Universities are not eligible for this exemption.

47. Defendants created a "Temporary Enforcement Safe Harbor" for religious organizations ineligible for the religious exemption.

48. The Universities were eligible for, and took advantage of, the Temporary Enforcement Safe Harbor.

49. The Temporary Enforcement Safe Harbor expires beginning January 1, 2014. More specifically, the Safe Harbor is no longer available at the beginning of the first plan year on or after January 1, 2014.

50. The Safe Harbor is thus not available to OBU and MACU with respect to the employee and student plan years that begin on January 1, 2014.

51. The Safe Harbor will no longer be available to SNU and OKWU with respect to its employee and student plan years that begin on July 1, 2014.

52. Defendants promulgated regulations that provide for accommodations for certain organizations not eligible for the exemption that have a religious objection to including some or all "FDA-approved contraceptive methods" and related counseling in their employee and/or student health insurance plans.

53. A non-exempt religious organization is eligible for an accommodation if it satisfies the following requirements: (a) it opposes providing coverage of some or all of any contraceptive services required to be covered under the applicable regulations on account of religious objections; (b) it is organized and operates as a nonprofit entity; (c) it holds itself out as a religious organization; and (d) it self-certifies, in a form and manner specified by the Secretaries of Health and Human Services and Labor, that it satisfies the three preceding criteria and makes such self-certification available for examination upon request.

54. Under the regulations, a group health plan established or maintained by an organization eligible for an accommodation ("eligible organization") that provides benefits on a self-insured basis complies with the requirement to provide contraceptive coverage if (a) the organization or its plan contracts with one or more third party administrators; and (b) the organization provides each third party administrator that will process claims for any

contraceptive services that must be covered with a copy of a "self-certification."

55. Under the regulations, a group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for some or all contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make such arrangements.

56. Under the regulations, if a third party administrator receives a copy of the self-certification, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services.

57. Under the regulations, a group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies with the requirement to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification to each issuer that would otherwise provide such coverage in connection with the group health plan.

58. A group health insurance issuer that receives a copy of the self-certification must (a) expressly exclude contraceptive coverage from the group

health insurance coverage provided in connection with the group health plan; (b) provide separate payments for any required contraceptive services for plan participants and beneficiaries for so long as they remain enrolled in the plan.

59. For each plan year with respect to which the accommodation is in effect, a third party administrator or issuer required to provide or arrange payments for contraceptive services must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year.

60. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints.

61. The regulations prohibit an issuer or third party administrator from passing the costs of the separate payments for contraceptive services on to the eligible organization, its group health plan, or plan participants or beneficiaries.

62. The Universities must choose among four options: (a) provide the coverage to which they

object; (b) violate the regulations and incur penalties of $100 per day for each affected individual; (c) discontinue all health plan coverage for employees and/or students; or (d) self-certify that they qualify for the accommodation and provide that self-certification to their third party administrators or issuers.

63. If the Universities discontinue health plan coverage for employees, they would be subject to an annual penalty of $2,000 per full-time employee, after the first 30 employees.

64. The Universities believe that, within the operation of the regulations, completing and delivering the self-certification to their issuers or third party administrators would violate the Universities' sincere religious beliefs.

65. The Universities believe that providing employee or student health insurance that includes coverage for Plan B, ella, and/or IUDs would violate the Universities' sincere religious beliefs.

66. The Universities' missions include promoting the spiritual maturity of members of their respective communities by fostering obedience to and love for what they understand to be God's laws, including His restrictions on the unjustified taking of innocent human life.

67. The Universities believe that sinful behavior adversely affects their relationships with God.

68. Christian conviction, including respect for and dignity and worth of human life from the moment of conception, is a qualification for entry into and participation in the Universities' communities.

II. Jurisdiction and Standing

Defendants responded to the Motion with a motion to dismiss, combined with a memorandum in opposition to the Motion. Doc. nos. 25 and 26, filed on December 17, 2013. The motion to dismiss is filed under Rules 12(b)(1) and (6), Fed.R.Civ.P. The motion to dismiss under Rule 12(b)(1) is apparently directed only to plaintiffs' claim that certain regulations were not promulgated in compliance with the Administrative Procedure Act. *See,* doc. no. 25, at 19, referring the court to pp. 43–44. The plaintiffs' motion for preliminary injunction does not seek relief on the basis of the APA claim. Consequently, the defendants' Rule 12(b)(1) motion need not be addressed at this juncture. The defendants' arguments under Rule 12(b)(6)—attacking the plaintiffs' RFRA claim on the merits—encompass the entire range of arguments advanced by defendants in opposition to plaintiffs request for a preliminary injunction. Accordingly, the court's consideration of the Rule 12(b)(6) issues will be subsumed in the court's resolution of the issues presented by the Motion.

Defendants' contentions with respect to standing are, likewise, addressed only to the APA claim. *See,* doc. no. 25, at 25, 43–44. Accordingly, since this action clearly falls, in the first instance, within the

grant of subject matter jurisdiction set forth in 28 U.S.C. § 1331, issues with respect to standing under the APA present no impediment to consideration of the Motion. *Cf. Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, at 1126 (10th Cir.2013), *cert. granted*, 134 S.Ct. 678 (Nov. 26, 2103).*See also, Reaching Souls International, Inc. v. Sebelius*, Case No. CIV–13–1092–D, U.S.D.C. W.D. Okla., Memorandum Decision and Order, Dec. 20, 2013 (doc. no. 67), at 7–9 (DeGiusti, J.) (herein: *Reaching Souls); Roman Catholic Archdiocese of New York v. Sebelius*, 2013 WL 6579764 at *6–7 (E.D.N.Y. Dec. 16, 2013).

III. Other Recent Decisions

The issues now before the court are of recent vintage, but the court is not without significant guidance, some of it binding and some not. Some, but certainly not all, of the issues in this action have been resolved (definitively for now, but subject to Supreme Court review) by the Tenth Circuit's *en banc* decision in *Hobby Lobby*. There is only a partial overlap between this case and *Hobby Lobby*. That case addressed several issues arising at the intersection of the ACA and RFRA, but issues as to the validity of the self-certification regulations for non-exempt religious organizations under 45 C.F.R. § 147.131 (herein: Self-certification Regulations; see Stipulation no. 53, above) were not before the court in *Hobby Lobby*.[1]*See also, Conestoga Wood*

[1] One of the predominant issues in *Hobby Lobby*, not present in this case, is the question of whether a private, for-profit business corporation may avail itself of RCRA's protections. *Hobby Lobby*, 723 F.3d at 1128*et seq*. No such issue is before the court in this action. To the extent (which is

Specialties Corp. v. Sec'y of U.S. Dept. of Health and Human Svces, 724 F.3d 377 (3d Cir. July 26, 2013), *cert. granted,*134 S.Ct. 678 (Nov. 26, 2013) (overlapping substantially with *Hobby Lobby*); *Autocam Corp. v. Sebelius,* 730 F.3d 618 (6th Cir. Sept. 17, 2013) (same); *Korte v. Sebelius,* 735 F.3d 654 (7th Cir. Nov. 8, 2013) (same) and *Gilardi v. U.S. Dep't of Human Svces,* 733 F.3d 1208 (D.C.Cir. Nov. 1, 2013) (same). More on point are five recent district court decisions directly addressing the validity of the Self-certification Regulations: *Reaching Souls, supra; Priests for Life v. U.S. Dep't of Health & Human Svces,* 2013 WL 6672400 (D.D.C. Dec. 19, 2013); *Roman Catholic Archdiocese of New York v. Sebelius,* 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius,* 2013 WL 6118696 (W.D.Pa. Nov. 21, 2013) and *Geneva College v. Sebelius,* 2013 WL 3071481 (W.D. Pa. June 18, 2013).

IV. Standard for Granting a Preliminary Injunction

Although, in some situations, more stringent or more relaxed standards apply, the showing normally required to support a request for a preliminary injunction is that the plaintiffs must show that (i) they are likely to succeed on the merits; (ii) they are likely to suffer irreparable harm in the absence of preliminary relief; (iii) the balance of equities tips in

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substantial, as will be seen) that the court relies on *Hobby Lobby* in this order, that reliance is based on conclusions articulated by the court in *Hobby Lobby* that will likely remain good law regardless of the fate, in the Supreme Court, of the Tenth Circuit's holding with respect to the status of business corporations under RFRA

their favor; and (iv) an injunction is in the public interest. *See, Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008); *see also, Hobby Lobby*, 723 F.3d at 1128. Plaintiffs assert that a more relaxed standard should be applied, doc. no. 20, at 4, but, for the reasons stated by Judge DeGiusti in *Reaching Souls, supra*, at 10, the court disagrees. Accordingly, the court will apply the traditional test.

V. Analysis Under the Preliminary Injunction Standard

A. Likelihood of Success on the Merits

1. Basic Principles Under RFRA

As wardens and dieticians throughout the federal prison system have discovered, the Religious Freedom Restoration Act of 1993, 42 U .S.C. §§ 2000bb *et seq.*, is a truly extraordinary piece of legislation. By its express terms, RFRA trumps any other federal law ("and the implementation of that law") encroaching upon the broad reach of RFRA, regardless of whether any such law was enacted before or after RFRA was enacted, "unless such law explicitly excludes" application of RFRA. 42 U.S.C. § 2000bb–3. As the Tenth Circuit explained in *Hobby Lobby:*

> Congress [in enacting RFRA] obligated itself to *explicitly exempt* later-enacted statutes from RFRA, which is conclusive evidence that RFRA trumps later federal statutes when RFRA has been violated. That is why our case law analogizes RFRA to a

> constitutional right [citing *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir.2001)].
>
> . . .
>
> Congress did not exempt the [Affordable Care Act] from RFRA, nor did it create any sort of wide-ranging exemption for HHS and other agencies charged with implementing the ACA through the regulations challenged here.

Hobby Lobby, 723 F.3d at 1146.

> RFRA's reach is expressed in § 2000bb–1:
>
> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (a) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

2. Application of RFRA Principles to the Stipulated Facts

Substantial burden

Under RFRA, government action imposes a "substantial[ ] burden" if it (i) requires participation in an activity prohibited by a sincerely held religious belief, (ii) prevents participation in conduct motivated by a sincerely held religious belief, or (iii) places substantial pressure on an adherent to engage in conduct contrary to a sincerely held religious belief. *Hobby Lobby*, at 1138 (citing and quoting from *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir.2010)).

The first step in applying the substantial burden test is to "identify the religious belief in this case."*Hobby Lobby*, at 1140.The parties' stipulation describes the plaintiffs' relevant beliefs in general terms as well as in terms specific to the court's consideration of the Self-certification Regulations:

- [W]ithin the operation of the [Self-certification Regulations], *completing and delivering the self-certification* to their issuers or third party administrators would violate the Universities' sincere religious beliefs.

- [P]roviding employee or student health insurance that includes coverage for Plan B, ella, and/or IUDs would violate the Universities' sincere religious beliefs.

- [Their] missions include promoting the spiritual maturity of members of their respective communities by fostering obedience to and love for what they understand to be God's laws, including His restrictions on the unjustified taking of innocent human life.

- [S]inful behavior adversely affects their relationships with God.

- Christian conviction, including respect for and dignity and worth of human life from the moment of conception, is a qualification for entry into and participation in the Universities' communities.

Stipulation, ¶¶ 64–68 (emphasis added).[2]

It is noteworthy that, in the case at bar, unlike the decision four days ago in *Priests for Life v. U.S. Dep't of Health & Human Svces,* 2013 WL 6672400 (D.D.C. Dec. 19, 2013), it is stipulated that the *act of signing the certification* is contrary to the religious

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[2] The defendants contest the plaintiffs' claims on many fronts, but their papers do not intimate, much less assert, that these beliefs are insincere. *Cf.Hobby Lobby*, at 1140 ("The government does not dispute the [plaintiffs'] sincerity, and we see no reason to question it either.").

beliefs to which these institutions subscribe. Thus, in *Priests for Life,* the court pointedly noted that:

> Plaintiffs here do not allege that the self-certification itself violates their religious beliefs. To the contrary, the certification states that Priests for Life is opposed to providing contraceptive coverage, which is consistent with those beliefs. Indeed, during oral argument, plaintiffs stated that they have no religious objection to filling out the self-certification; it is the issuer's subsequent provision of coverage to which they object.

Id. at * 2.[3]

Thus, the combined effect of the ACA and the Self-certification Regulations is that the universities are forced by law to choose one of four options:

> (a) provide the coverage to which they object; (b) violate the regulations and incur penalties of $100 per day for each affected individual; (c) discontinue all health plan coverage for employees and/or students; or (d) self-certify that they qualify for the accommodation and provide that self-certification to their third party administrators or issuers.

Stipulation, ¶ 62.

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[3] *Compare, Zubik,* 2013 WL 6118696, at * 19:"The act of signing the self-certification form will violate these Plaintiffs' sincerely-held religious beliefs."

This, plainly, is a "Hobson's choice," *Hobby Lobby*, at 1141; *Abdulhaseeb*, 600 F.3d at 1315. Defendants belittle the burden of signing the self-certification. Doc. no. 25 at 24–25. But, unless they choose to contest the sincerity of the beliefs in question, their belittling is impermissible under RFRA: "Our only task is to determine whether the claimant's belief is sincere, and if so, whether the government has applied substantial pressure on the claimant to violate that belief."*Hobby Lobby* at 1137.The focus is on the pressure exerted, not on the onerousness of the physical act that might result from yielding to that pressure. If the belief is sincere and the pressure to violate that belief is substantial, the substantial burden test is satisfied. *Id.* at 1137–38.[4]

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[4] The defendants' argument that the burden on plaintiffs is only indirect, doc. no. 25 at 31–32, fares no better. Although *Hobby Lobby* does not address the Self-certification Regulations because the "accommodation" was not in issue in that case, the court's opinion suggests that the universities' position on this issue (*i.e.* whether the fact that the accommodation arguably moves the provision of objected to contraceptive services to a third party and therefore makes it unnecessary for the university to provide the services or violate its religious beliefs) would prevail in that court. For example, *Hobby Lobby*, at 1139, quotes *Thomas v. Review Bd. of the Indiana Employment Security Division*, 450 U.S. 707 (1981), for the proposition that "While the compulsion may be *indirect*, the infringement upon free exercise is *nonetheless substantial.*").*Hobby Lobby* characterizes *United States v. Lee*, 455 U.S. 252 (1982), as a case which did not turn on whether the Amish faced direct or indirect coercion or whether the supposed violations of their faith turned on actions of independent third parties. *Hobby Lobby*, at 1139–40.*Compare: Priests for Life v. U.S. Dep't of Health & Human Svces*, 2013 WL 6672400, at * 8 (D.D.C. Dec.

The self certification is, in effect, a permission slip which must be signed by the institution to enable the plan beneficiary to get access, free of charge, from the institution's insurer or third party administrator, to the products to which the institution objects. If the institution does not sign the permission slip, it is subject to very substantial penalties or other serious consequences. If the institution does sign the permission slip, and only if the institution signs the permission slip, institution's insurer or third party administrator is obligated to provide the free products and services to the plan beneficiary. It is no answer to assert, as the government does here, that, in self-certifying, the institution is not required to do anything more onerous than signing a piece of paper. Doc. no. 25, at 25–27. The government's argument rests on the premise that the simple act of signing a piece of paper, even with knowledge of the consequences that will flow from that signing, cannot be morally (and, in this case, religiously) repugnant—an argument belied by too many tragic historical episodes to be canvassed here. The burden, under RFRA, is not to be measured by the onerousness of a single physical act. RFRA undeniably focuses on violations of conscience, not on physical acts. Thus, the question is not whether the reasonable observer would

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19, 2013) ("The accommodation specifically ensures that provision of contraceptive services is entirely the activity of a third party—namely, the issuer—and Priests for Life plays no role in that activity.") That analysis, if it were applied to the act of signing the self-certification (not at issue in *Priests for Life*, as discussed above on p. 15) could not be squared with the Supreme Court's decisions in *Thomas* and *Lee* or with the Tenth Circuit's decision in *Hobby Lobby*.

consider the plaintiffs complicit in an immoral act, but rather how the plaintiffs themselves measure their degree of complicity. *Hobby Lobby,* at 1142.

The government has put these institutions to a choice of either acquiescing in a government-enforced betrayal of sincerely held religious beliefs, or incurring potentially ruinous financial penalties, or electing other equally ruinous courses of action. That is the burden, and it is substantial.

Compelling governmental interest

RFRA's second prong requires the court to determine whether the government has presented a compelling interest implemented through the least restrictive means available. *Hobby Lobby* at 1142–43.

Even at the preliminary injunction stage, the government is required to demonstrate that mandating compliance with the contraceptive-coverage requirement by way of the Self-certification Regulations is the least restrictive means of advancing a compelling interest. *Hobby Lobby* at 1143.The court must scrutinize the asserted harm of granting the specific exemption sought to *the particular religious claimants before the court. Hobby Lobby* at 1143. The government's justification must focus on the claimant asserting the RFRA violation, not on its interest in promoting some general policy. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418, 431 (2006); *Hobby Lobby* at 1143 (citing *O Centro).* It must show with particularity how even an admittedly strong interest

would be adversely affected by granting the exemption requested. *Id.* (citing *Wisconsin v. Yoder*, 406 U.S; 205, 236 (1972).

Aside from mentioning generalized governmental interests in public health and gender equality (interests which are neither challenged by the plaintiffs nor questioned by this court), the government offers no developed argument on this prong, noting, as it must, that the Tenth Circuit has rejected the government's public health and gender equity arguments. Doc. no. 25, at 27–28.

Moreover:

> Even if the government had stated a compelling interest in public health or gender equality, it has not explained how those larger interests would be undermined by granting [the universities] their requested exemption. [They] ask only to be excused from covering four contraceptive methods out of twenty, not to be excused from covering contraception altogether. The government does not articulate why accommodating such a limited request fundamentally frustrates its goals.

Hobby Lobby, at 1144.

In short, although the *Hobby Lobby* decision does not address the accommodation, its rationales provide guidance, as do other decisions which have granted preliminary relief in cases in which the government relied on the accommodation. *Reaching*

Souls International, Inc. v. Sebelius, Case No. CIV–13–1092–D, U.S.D.C. W.D. Okla., Memorandum Decision and Order, Dec. 20, 2013 (doc. no. 67); *Roman Catholic Archdiocese of New York v. Sebelius*, 2013 WL 6579764 (E.D.N.Y. Dec. 16, 2013); *Zubik v. Sebelius*, 2013 WL 6118696 (W.D.Pa. Nov. 21, 2013) (Trustee of Roman Catholic Diocese, beneficial owner of Catholic benefits trust, and Catholic Charities of Diocese granted preliminary injunction, having shown, among other things, that the government did not have a compelling interest); *Geneva College v. Sebelius*, 2013 WL 3071481 (W.D. Pa. June 18, 2013) (non-profit religious college; preliminary injunction granted). The government's policy argument, not particularized to demonstrate a compelling governmental interest in enforcing all parts of the defendants' contraceptive policy prescription *against these claimants*, fails, for that reason, as a matter of law.

But, if it were a close question (it is not), any contention that the government's asserted interest is compelling would be thoroughly undermined by the fact that application of the government's policy prescription is riddled with exceptions. *Hobby Lobby*, at 1123–24 (cataloging exceptions and exemptions). The number of individuals who are covered by exempt health plans has been estimated at more than 50 million, and perhaps as many as 100 million. *Id.* at 1124.Including individuals covered by "grandfathered" plans, the number of excepted and exempted individuals may total more than 190 million. *Geneva College*, 2013 WL 3071481, at *10. Taken one by one, each exemption and exception likely has an appealing, or at least defensible,

rationale. But this assemblage of special cases "severely undermines the legitimacy of defendants' claim of a compelling interest." *Id.* Thus, the number of exemptions and exceptions, let alone the number of individuals affected thereby, is not just a convenient straw man: granting that there may well be a plausible basis for every exception that has been carved out of the mandate, the government's arguments for a compelling interest in applying the mandate in every particular to these universities ring hollow in light of the collective effect of those exceptions and exemptions.

Least restrictive means

The government offers no developed argument on the issue of whether it has employed the "least restrictive means of furthering" its governmental interest. Accordingly, as was the case in *Hobby Lobby,* 723 F.3d at 1144, the government loses by default on this issue. *Alpine Bank v. Hubbell,* 555 F.3d 1097, 1109 (10th Cir.2009) (citing *Murrell v. Shalala,* 43 F.3d 1388, 1389 n. 2 (10th Cir.1994)). Aside from that waiver, the court agrees with the conclusion in *Roman Catholic Archdiocese of New York v. Sebelius,* 2013 WL 6579764 at * 18–19 (E.D.N.Y. Dec. 16, 2013) that the defendants have not employed the least restrictive means of furthering the governmental interest that they assert.

B. Irreparable Harm

Viewing the matter in light of the extraordinary preemptive effect of RFRA, the Tenth Circuit has

equated RFRA violations with First Amendment violations. *Hobby Lobby,* 723 F.3d at 1146 (citing *Kikumura v. Hurley,* 242 F.3d 950, 963 (10th Cir.2001). On that basis, the Tenth Circuit made short work of the irreparable harm issue: "a likely RFRA violation satisfies the irreparable harm factor."*Hobby Lobby* at 1146.That prerequisite has, accordingly, been satisfied here.[5]

C. The Balance of the Equities

Plaintiffs have no objection to coverage for any of the mandated products other than Plan B, ella and IUDs. Stipulation, ¶¶ 2, 3, 65. That leaves sixteen of

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[5] Even though, as discussed, the irreparable harm requirement has been satisfied essentially as a matter of law, one factual contention advanced by defendants deserves mention at least in passing. Defendants argue that two of the plaintiffs, Southern Nazarene University and Oklahoma Wesleyan University cannot show irreparable harm because "the challenged regulations will not be enforced by defendants against [those plaintiffs] until July 1, 2014 ."Doc. no. 25, at 48. On this point, the court will observe, simply, that the fact that the other plaintiffs may be able, one way or another, to come within a few days of their year-end renewal date does not mean it would be reasonable to require Southern Nazarene and Oklahoma Wesleyan to incur the serious financial and administrative risk that would be inherent in substantial additional delay, nor does that mean that the court would be able to adjudicate the issues as to Southern Nazarene and Oklahoma Wesleyan by way of a Rule 54 final judgment before July 1, 2014. Moreover, the irreparable harm requirement, even where not satisfied as a matter of law, need not be supported by a showing of imminent disaster. *Kansas Health Care Ass'n v. Kansas Dep't of Social and Rehabilitation Svces,* 31 F.3d 1536, 1544 (10th Cir.1994).

the twenty mandated methods available, *Hobby Lobby*, at 1146, for which reason:

> "the government's interest is largely realized while coexisting with [the universities'] religious objections. And in any event, the government has already exempted health plans covering millions of others. *These plans need not provide any of the twenty contraceptive methods.*
>
> By contrast, [the universities] remain subject to the Hobson's choice between catastrophic fines or violating [their] religious beliefs. Accordingly, the balance of equities tips in [the universities'] favor.

Hobby Lobby, 723 F.3d at 1146–47 (emphasis added).

D. The Public Interest

A grant of preliminary injunctive relief in these circumstances would be in the public interest. *Id.* There is no need to elaborate upon the Tenth Circuit's conclusion on this issue.

VI. Conclusion

Plaintiffs' motion for preliminary injunction, doc. no. 19, is **GRANTED.**Defendants' motion to dismiss, doc. no. 26, to the extent that it seeks dismissal under Rule 12(b)(6), is **DENIED.**

PRELIMINARY INJUNCTION

The defendants, their agents, officers, and employees, and all others in active concert or participation with them, Rule 65, Fed.R.Civ.P., are **ENJOINED** and **RESTRAINED** from any effort to apply or enforce, as to plaintiffs, the substantive requirements imposed by 42 U.S.C. § 300gg–13(a)(4) and at issue in this case, or the self-certification regulations related thereto, or any penalties, fines or assessments related thereto, until the further order of the court.

Dated this 23rd day of December, 2013.

s/Stephen P. Friot
Stephen P. Friot
United States District Judge

FILED
United States Court of Appeals
Tenth Circuit

July 14, 2015

Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER, COLORADO, a Colorado non-profit corporation, by themselves and on behalf of all others similarly situations; CHRISTIAN BROTHERS EMPLOYEE BENEFIT TRUST,

Plaintiffs-Appellants,

v.

SYLVIA MATTHEWS BURWELL, Secretary of the United States Department of Health &

No. 13-1540
(D.C. No. 1:13-cv-02611-WJM-BNB)
(D. Colo.)

Human Services; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the united states Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY,

Defendants – Appellees.

SOUTHERN NAZARENE UNIVERSITY; OKLAHOMA WESLEYAN UNIVERSITY; OKLAHOMA BAPTIST UNIVERSITY; MID-AMERICA CHRISTIAN UNIVERSITY; REACHING SOULS INTERNATIONAL, INC., an Oklahoma not for profit corporation; TRUETT-MCCONNELL COLLEGE, INC., a Georgia nonprofit corporation, by themselves and on behalf

of all others similarly situated; GUIDESTONE FINANCIAL RESOURCES OF THE SOUTHERN BAPTIST CONVENTION, a Texas nonprofit corporation, Plaintiffs – Appellees, v. SYLVIA MATHEWS BURWELL, Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; THOMAS E. PEREZ, Secretary of the United States Department of Labor; UNITED STATES DEPARTMENT OF LABOR; JACOB J. LEW, Secretary of the United States Department of the Treasury; UNITED STATES DEPARTMENT OF THE TREASURY, Defendants – Appellants.	Nos. 14-6026 & 14-6028 (D.C. No. 5:13-cv-01092 – D)

67 CATHOLIC THEOLOGIANS AND ETHICISTS; ALABAMA PHYSICIANS FOR LIFE; AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN BIBLE SOCIETY; AMERICAN CENTER FOR LAW AND JUSTICE; AMERICAN CIVIL LIBERTIES UNION OF COLORADO; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; AMERICAN CIVIL LIBERTIES UNION; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME); AMERICAN PUBLIC HEALTH ASSOCIATION; AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE;

ASIAN & PACIFIC ISLANDER AMERICAN HEALTH FORUM; ASIAN AMERICANS ADVANCING JUSTICE | AAJC; ASIAN AMERICANS ADVANCING JUSTICE | LOS ANGELES; ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS; ASSOCIATION OF CHRISTIAN SCHOOLS INTERNATIONAL; ASSOCIATION OF GOSPEL RESCUE MISSIONS; BLACK WOMEN'S HEALTH IMPERATIVE; CALIFORNIA WOMEN'S LAW CENTER, NATIONAL WOMEN'S LAW CENTER; CALIFORNIA WOMEN'S LAW CENTER; CATHOLIC MEDICAL ASSOCIATION; CHRISTIAN LEGAL SOCIETY; CHRISTIAN MEDICAL ASSOCIATION; CHRISTIE'S PLACE;

CONCERNED WOMEN FOR AMERICA; DR. R. ALBERT MOHLER, JR.; ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION; FEMINIST MAJORITY FOUNDATION; FORWARD TOGETHER; HIV LAW PROJECT; IBIS REPRODUCTIVE HEALTH; INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE AND CHRISTIAN LEGAL SOCIETY; INTERNATIONAL MISSION BOARD OF THE SOUTHERN BAPTIST CONVENTION; IPAS; LEGAL MOMENTUM; LIBERTY COUNSEL; LIBERTY UNIVERSITY; LIBERTY, LIFE, AND LAW FOUNDATION; LUTHERAN CHURCH - MISSOURI SYNOD; MERGER WATCH; NARAL PRO-CHOICE AMERICA; NARAL PRO-

CHOICE COLORADO; NARAL PRO-CHOICE WYOMING; NATIONAL ASIAN PACIFIC AMERICAN WOMEN'S FORUM; NATIONAL ASSOCIATION OF CATHOLIC NURSES; NATIONAL ASSOCIATION OF EVANGELICALS; NATIONAL ASSOCIATION OF PRO LIFE NURSES; NATIONAL CATHOLIC BIOETHICS CENTER; NATIONAL FAMILY PLANNING & REPRODUCTIVE HEALTH ASSOCIATION; NATIONAL HEALTH LAW PROGRAM; NATIONAL LATINA INSTITUTE FOR REPRODUCTIVE HEALTH; NATIONAL ORGANIZATION FOR WOMEN (NOW) FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NATIONAL

WOMEN AND AIDS COLLECTIVE; NATIONAL WOMEN'S HEALTH NETWORK; NATIONAL WOMEN'S LAW CENTER; PLANNED PARENTHOOD ASSOCIATION OF UTAH; PLANNED PARENTHOOD OF KANSAS AND MIDMISSOURI; PLANNED PARENTHOOD OF THE HEARTLAND; PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.; POPULATION CONNECTION; PRISON FELLOWSHIP MINISTRIES; RAISING WOMEN'S VOICES FOR THE HEALTH CARE WE NEED; SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU); SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS); SOUTHERN BAPTIST

THEOLOGICAL SEMINARY; UNITED STATES CONFERENCE OF CATHOLIC BISHOPS,

Amici Curiae.

JUDGMENT

Before **MATHESON**, **McKAY**, and **BALDOCK**, Circuit Court Judges.

These cases originated in the District of Colorado and the Western District of Oklahoma and were argued by counsel. The District Court's denial of a preliminary injunction in *Little Sisters*, 6 F. Supp. 3d 1225, is affirmed, and the District Court's grant of a preliminary injunction in *Southern Nazarene*, 2013 WL 6804265, and *Reaching Souls*, 2013 WL 6804259, is reversed. The cases are remanded to the United States District Courts for the District of Colorado and the Western District of Oklahoma for further proceedings in accordance with the opinion of this court.

Entered for the Court

s/Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

26 U.S.C. § 4980D

(a) General rule.—There is hereby imposed a tax on any failure of a group health plan to meet the requirements of chapter 100 (relating to group health plan requirements).

(b) Amount of tax.—

(1) In general.—The amount of the tax imposed by subsection (a) on any failure shall be $100 for each day in the noncompliance period with respect to each individual to whom such failure relates.

2) Noncompliance period.—For purposes of this section, the term "noncompliance period" means, with respect to any failure, the period—

(A) beginning on the date such failure first occurs, and

(B) ending on the date such failure is corrected.

(3) Minimum tax for noncompliance period where failure discovered after notice of examination.— Notwithstanding paragraphs (1) and (2) of subsection (c)—

(A) In general.—In the case of 1 or more failures with respect to an individual—

(i) which are not corrected before the date a notice of examination of income tax liability is sent to the employer, and

(ii) which occurred or continued during the period under examination, the amount of tax imposed by subsection (a) by reason of such failures with respect to such individual shall not be less than the lesser of $2,500 or the amount of tax which would be imposed by subsection (a) without regard to such paragraphs.

(B) Higher minimum tax where violations are more than de minimis.—To the extent violations for which any person is liable under subsection (e) for any year are more than de minimis, subparagraph (A) shall be applied by substituting "$15,000" for "$2,500" with respect to such person.

(C) Exception for church plans.—This paragraph shall not apply to any failure under a church plan (as defined in section 414(e)).

(c) Limitations on amount of tax.—

(1) Tax not to apply where failure not discovered exercising reasonable diligence.—No tax shall be imposed by subsection (a) on any failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such tax did not know, and

exercising reasonable diligence would not have known, that such failure existed.

(2) Tax not to apply to failures corrected within certain periods.—No tax shall be imposed by subsection (a) on any failure if—

(A) such failure was due to reasonable cause and not to willful neglect, and

(B)(i) in the case of a plan other than a church plan (as defined in section 414(e)), such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for such tax knew, or exercising reasonable diligence would have known, that such failure existed, and

(ii) in the case of a church plan (as so defined), such failure is corrected before the close of the correction period (determined under the rules of section 414(e)(4)(C)).

(3) Overall limitation for unintentional failures.— In the case of failures which are due to reasonable cause and not to willful neglect—

(A) Single employer plans.—

(i) In general.—In the case of failures with respect to plans other than specified multiple employer health plans, the tax imposed by subsection (a) for failures

during the taxable year of the employer shall not exceed the amount equal to the lesser of—

(I) 10 percent of the aggregate amount paid or incurred by the employer (or predecessor employer) during the preceding taxable year for group health plans, or

(II) $500,000.

(ii) Taxable years in the case of certain controlled groups.—For purposes of this subparagraph, if not all persons who are treated as a single employer for purposes of this section have the same taxable year, the taxable years taken into account shall be determined under principles similar to the principles of section 1561.

(B) Specified multiple employer health plans.—

(i) In general.—In the case of failures with respect to a specified multiple employer health plan, the tax imposed by subsection (a) for failures during the taxable year of the trust forming part of such plan shall not exceed the amount equal to the lesser of—

(I) 10 percent of the amount paid or incurred by such trust during such taxable year to provide medical care (as

defined in section 9832(d)(3)) directly or through insurance, reimbursement, or otherwise, or

(II) $500,000.

For purposes of the preceding sentence, all plans of which the same trust forms a part shall be treated as one plan.

(ii) Special rule for employers required to pay tax.—If an employer is assessed a tax imposed by subsection (a) by reason of a failure with respect to a specified multiple employer health plan, the limit shall be determined under subparagraph (A) (and not under this subparagraph) and as if such plan were not a specified multiple employer health plan.

(4) Waiver by Secretary.—In the case of a failure which is due to reasonable cause and not to willful neglect, the Secretary may waive part or all of the tax imposed by subsection (a) to the extent that the payment of such tax would be excessive relative to the failure involved.

(d) Tax not to apply to certain insured small employer plans.—

(1) In general.— In the case of a group health plan of a small employer which provides health insurance coverage solely through a contract with a health insurance issuer, no tax shall be

imposed by this section on the employer on any failure (other than a failure attributable to section 9811) which is solely because of the health insurance coverage offered by such issuer.

(2) Small employer.—

(A) In general.—For purposes of paragraph (1), the term "small employer" means, with respect to a calendar year and a plan year, an employer who employed an average of at least 2 but not more than 50 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. For purposes of the preceding sentence, all persons treated as a single employer under subsection (b), (c), (m), or (o) of section 414 shall be treated as one employer.

(B) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is a small employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(C) Predecessors.—Any reference in this paragraph to an employer shall include a reference to any predecessor of such employer.

(3) Health insurance coverage; health insurance issuer.—For purposes of paragraph (1), the terms "health insurance coverage" and "health insurance issuer" have the respective meanings given such terms by section 9832.

(e) Liability for tax.—The following shall be liable for the tax imposed by subsection (a) on a failure:

(1) Except as otherwise provided in this subsection, the employer.

(2) In the case of a multiemployer plan, the plan.

(3) In the case of a failure under section 9803 (relating to guaranteed renewability) with respect to a plan described in subsection (f)(2)(B), the plan.

(f) Definitions.—For purposes of this section—

(1) Group health plan.—The term "group health plan" has the meaning given such term by section 9832(a).

(2) Specified multiple employer health plan.—The term "specified multiple employer health plan" means a group health plan which is—

(A) any multiemployer plan, or

(B) any multiple employer welfare arrangement (as defined in section 3(40) of the Employee Retirement Income Security

Act of 1974, as in effect on the date of the enactment of this section).

(3) Correction.—A failure of a group health plan shall be treated as corrected if—

(A) such failure is retroactively undone to the extent possible, and

(B) the person to whom the failure relates is placed in a financial position which is as good as such person would have been in had such failure not occurred.

26 U.S.C. § 4980H

(a) Large employers not offering health coverage.—If—

(1) any applicable large employer fails to offer to its full-time employees (and their dependents) the opportunity to enroll in minimum essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(2) at least one full-time employee of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or costsharing reduction is allowed or paid with respect to the employee, then there is hereby imposed on the employer an assessable payment equal to the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

b) Large employers offering coverage with employees who qualify for premium tax credits or cost-sharing reductions.—

(1) In general. —If—

(A) an applicable large employer offers to its fulltime employees (and their dependents) the opportunity to enroll in minimum

essential coverage under an eligible employer-sponsored plan (as defined in section 5000A(f)(2)) for any month, and

(B) 1 or more full-time employees of the applicable large employer has been certified to the employer under section 1411 of the Patient Protection and Affordable Care Act as having enrolled for such month in a qualified health plan with respect to which an applicable premium tax credit or costsharing reduction is allowed or paid with respect to the employee,

then there is hereby imposed on the employer an assessable payment equal to the product of the number of full-time employees of the applicable large employer described in subparagraph (B) for such month and an amount equal to 1/12 of $3,000.

(2) Overall limitation.—The aggregate amount of tax determined under paragraph (1) with respect to all employees of an applicable large employer for any month shall not exceed the product of the applicable payment amount and the number of individuals employed by the employer as full-time employees during such month.

[(3) Repealed. Pub.L. 112-10, Div. B, Title VIII, § 1858(b)(4), Apr. 15, 2011, 125 Stat. 169]

(c) Definitions and special rules.—

For purposes of this section—

(1) Applicable payment amount.—The term "applicable payment amount" means, with respect to any month, 1/12 of $2,000.

(2) Applicable large employer.—

(A) In general.— The term "applicable large employer" means, with respect to a calendar year, an employer who employed an average of at least 50 fulltime employees on business days during the preceding calendar year.

(B) Exemption for certain employers.—

(i) In general.—An employer shall not be considered to employ more than 50 full-time employees if—

(I) the employer's workforce exceeds 50 full-time employees for 120 days or fewer during the calendar year, and

(II) the employees in excess of 50 employed during such 120-day period were seasonal workers.

(ii) Definition of seasonal workers.—

(C) Rules for determining employer size.—For purposes of this paragraph—

(i) Application of aggregation rule for employers.— All persons treated as a single employer under subsection (b), (c), (m), or (o) of

section 414 of the Internal Revenue Code of 1986 shall be treated as 1 employer.

(ii) Employers not in existence in preceding year.— In the case of an employer which was not in existence throughout the preceding calendar year, the determination of whether such employer is an applicable large employer shall be based on the average number of employees that it is reasonably expected such employer will employ on business days in the current calendar year.

(iii) Predecessors.—Any reference in this subsection to an employer shall include a reference to any predecessor of such employer.

(D) Application of employer size to assessable penalties—

(i) In general.—The number of individuals employed by an applicable large employer as fulltime employees during any month shall be reduced by 30 solely for purposes of calculating—

(I) the assessable payment under subsection (a), or

(II) the overall limitation under subsection (b)(2).

(ii) Aggregation—In the case of persons treated as 1 employer under subparagraph (C)(i), only 1 reduction under subclause (I) or (II) shall be allowed with respect to such persons and such reduction shall be allocated among such persons

ratably on the basis of the number of full-time employees employed by each such person.

(E) Full-time equivalents treated as full-time employees.—Solely for purposes of determining whether an employer is an applicable large employer under this paragraph, an employer shall, in addition to the number of full-time employees for any month otherwise determined, include for such month a number of full-time employees determined by dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120.

(3) Applicable premium tax credit and cost-sharing reduction.—The term "applicable premium tax credit and cost-sharing reduction" means—

(A) any premium tax credit allowed under section 36B,

(B) any cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act, and

(C) any advance payment of such credit or reduction under section 1412 of such Act.

(4) Full-time employee—

(A) In general.—The term "full-time employee" means, with respect to any month, an employee who is employed on average at least 30 hours of service per week.

(B) Hours of service.—The Secretary, in consultation with the Secretary of Labor, shall prescribe such regulations, rules, and guidance as may be necessary to determine the hours of service of an employee, including rules for the application of this paragraph to employees who are not compensated on an hourly basis.

(5) Inflation adjustment.—

(A) In general.—In the case of any calendar year after 2014, each of the dollar amounts in subsection (b) and paragraph (1) shall be increased by an amount equal to the product of

(i) such dollar amount, and

(ii) the premium adjustment percentage (as defined in section 1302(c)(4) of the Patient Protection and Affordable Care Act) for the calendar year.

(B) Rounding.—If the amount of any increase under subparagraph (A) is not a multiple of $10, such increase shall be rounded to the next lowest multiple of $10.

(6) Other definitions.—Any term used in this section which is also used in the Patient Protection and Affordable Care Act shall have the same meaning as when used in such Act.

(7) Tax nondeductible.—For denial of deduction for the tax imposed by this section, see section 275(a)(6).

(d) Administration and procedure.—

(1) In general.—Any assessable payment provided by this section shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as an assessable penalty under subchapter B of chapter 68.

(2) Time for payment.—The Secretary may provide for the payment of any assessable payment provided by this section on an annual, monthly, or other periodic basis as the Secretary may prescribe.

(3) Coordination with credits, etc.— The Secretary shall prescribe rules, regulations, or guidance for the repayment of any assessable payment (including interest) if such payment is based on the allowance or payment of an applicable premium tax credit or costsharing reduction with respect to an employee, such allowance or payment is subsequently disallowed, and the assessable payment would not have been required to be made but for such allowance or payment.

42 U.S.C. § 2000bb-1

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. § 2000bb-2

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and (4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. § 2000cc-5

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause "means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government
The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. § 300gg-13(a)

(a) In general

A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for—

(1) evidence-based items or services that have in effect a rating of "A" or "B" in the current recommendations of the United States Preventive Services Task Force;

(2) immunizations that have in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention with respect to the individual involved; and[6]

(3) with respect to infants, children, and adolescents, evidence-informed preventive care and screenings provided for in the comprehensive guidelines supported by the Health Resources and Services Administration.[7]

(4) with respect to women, such additional preventive care and screenings not described in paragraph (1) as provided for in comprehensive guidelines supported by the Health Resources and Services Administration for purposes of this paragraph.[2]

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[6] So in original. The word "and" probably should not appear.

[7] So in original. The period probably should be a semicolon.

(5) for the purposes of this chapter, and for the purposes of any other provision of law, the current recommendations of the United States Preventive Service Task Force regarding breast cancer screening, mammography, and prevention shall be considered the most current other than those issued in or around November 2009

Nothing in this subsection shall be construed to prohibit a plan or issuer from providing coverage for services in addition to those recommended by United States Preventive Services Task Force or to deny coverage for services that are not recommended by such Task Force.

26 C.F.R. § 54.9815-2713AT

(a) [Reserved]. For further guidance, see § 54.9815-2713A(a).

(b) Contraceptive coverage--self-insured group health plans. (1) A group health plan established or maintained by an eligible organization that provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides either a copy of the self-certification to each third party administrator or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage of all or a subset of contraceptive services. (3) The organization holds itself out as a religious organization.

(A) When a copy of the self-certification is provided directly to a third party administrator, such self-certification must include notice that obligations of the third party administrator are set forth in 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(B) When a notice is provided to the Secretary of Health and Human Services, the notice must include

the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on sincerely held religious beliefs to coverage of some or all contraceptive services (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Labor (working with the Department of Health and Human Services), will send a separate notification to each of the plan's third party administrators informing the third party administrator that the Secretary of Health and Human Services has received a notice under paragraph (b)(1)(ii) of this section and describing the obligations of the third party administrator under 29 CFR 2510.3-16 and this section and under § 54.9815-2713A.

(2) If a third party administrator receives a copy of the self-certification from an eligible organization or a notification from the Department of Labor, as described in paragraph (b)(1)(ii) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange

payments for contraceptive services using one of the following methods—

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally-facilitated Exchange user fee for a participating issuer pursuant to 45 CFR 156.50(d).

(4) A third party administrator may not require any documentation other than a copy of the self-certification from the eligible organization or

notification from the Department of Labor described in paragraph (b)(1)(ii) of this section.

(c) Contraceptive coverage--insured group health plans-- (1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 54.9815-2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan provides either a copy of the self-certification to each issuer providing coverage in connection with the plan or a notice to the Secretary of Health and Human Services that it is an eligible organization and of its religious objection to coverage for all or a subset of contraceptive services.

(i) When a copy of the self-certification is provided directly to an issuer, the issuer has sole responsibility for providing such coverage in accordance with § 54.9815-2713. An issuer may not require any further documentation from the eligible organization regarding its status as such.

(ii) When a notice is provided to the Secretary of Health and Human Services, the notice must include the name of the eligible organization and the basis on which it qualifies for an accommodation; its objection based on its sincerely held religious beliefs to coverage of some or all contraceptive services, as applicable (including an identification of the subset of contraceptive services to which coverage the eligible organization objects, if applicable); the plan name and type (i.e., whether it is a student health

insurance plan within the meaning of 45 CFR 147.145(a) or a church plan within the meaning of ERISA section 3(33)); and the name and contact information for any of the plan's third party administrators and health insurance issuers. If there is a change in any of the information required to be included in the notice, the organization must provide updated information to the Secretary of Health and Human Services. The Department of Health and Human Services will send a separate notification to each of the plan's health insurance issuers informing the issuer that the Secretary of Health and Human Services has received a notice under paragraph (c)(1) of this section and describing the obligations of the issuer under this section and under § 54.9815-2713A.

(2) Payments for contraceptive services.

(i) A group health insurance issuer that receives a copy of the self-certification or notification described in paragraph (b)(1)(ii) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 54.9815-2713(a)(1)(iv) must--

(ii)[Reserved]. For further guidance, see § 54.9815-2713A(c)(2)(ii).

(d) [Reserved]. For further guidance, see § 54.9815-2713A(d).

(e) [Reserved]. For further guidance, see § 54.9815-2713A(e).

(f) Expiration date. This section expires on August 22, 2017 or on such earlier date as may be provided in final regulations or other action published in the Federal Register.

29 C.F.R. § 2510.3–16

(a) In general. The term "plan administrator" or "administrator" means the person specifically so designated by the terms of the instrument under which the plan is operated. If an administrator is not so designated, the plan administrator is the plan sponsor, as defined in section 3(16)(B) of ERISA.

(b) In the case of a self-insured group health plan established or maintained by an eligible organization, as defined in § 2590.715–2713A(a) of this chapter, if the eligible organization provides a copy of the self-certification of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715–2713A(b)(1)(ii) of this chapter to a third party administrator, the self-certification shall be an instrument under which the plan is operated, shall be treated as a designation of the third party administrator as the plan administrator under section 3(16) of ERISA for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, and shall supersede any earlier designation. If, instead, the eligible organization notifies the Secretary of Health and Human Services of its objection to administering or funding any contraceptive benefits in accordance with § 2590.715–2713A(b)(1)(ii) of this chapter, the Department of Labor, working with the Department of Health and Human Services, shall separately provide notification to each third party administrator that such third party administrator shall be the plan administrator under section 3(16)

of ERISA for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) of this chapter to which the eligible organization objects on religious grounds, with respect to benefits for contraceptive services that the third party administrator would otherwise manage. Such notification from the Department of Labor shall be an instrument under which the plan is operated and shall supersede any earlier designation.

(c) A third party administrator that becomes a plan administrator pursuant to this section shall be responsible for—

(1) Complying with section 2713 of the Public Health Service Act (42 U.S.C. 300gg–13) (as incorporated into section 715 of ERISA) and § 2590.715–2713 of this chapter with respect to coverage of contraceptive services. To the extent the plan contracts with different third party administrators for different classifications of benefits (such as prescription drug benefits versus inpatient and outpatient benefits), each third party administrator is responsible for providing contraceptive coverage that complies with section 2713 of the Public Health Service Act (as incorporated into section 715 of ERISA) and § 2590.715–2713 of this chapter with respect to the classification or classifications of benefits subject to its contract.

(2) Establishing and operating a procedure for determining such claims for contraceptive services in accordance with § 2560.503–1 of this chapter.

(3) Complying with disclosure and other requirements applicable to group health plans under Title I of ERISA with respect to such benefits.

29 C.F.R. § 2590.715-2713A

(a) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it satisfies the criteria in paragraphs (a)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (b) or (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of ERISA.

(b) Contraceptive coverage--self-insured group health plans--

(1) A group health plan established or maintained by an eligible organization that

provides benefits on a self-insured basis complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if all of the requirements of this paragraph (b)(1) are satisfied:

(i) The eligible organization or its plan contracts with one or more third party administrators.

(ii) The eligible organization provides each third party administrator that will process claims for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) with a copy of the self-certification described in paragraph (a)(4) of this section, which shall include notice that--

> (A) The eligible organization will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and
>
> (B) Obligations of the third party administrator are set forth in § 2510.3–16 of this chapter and § 2590.715–2713A.

(iii) The eligible organization must not, directly or indirectly, seek to interfere with a third party administrator's arrangements to provide or arrange separate payments for contraceptive services for participants or beneficiaries, and must not, directly or indirectly, seek to influence the third party administrator's decision to make any such arrangements.

(2) If a third party administrator receives a copy of the self-certification described in paragraph (a)(4) of this section, and agrees to enter into or remain in a contractual relationship with the eligible organization or its plan to provide administrative services for the plan, the third party administrator shall provide or arrange payments for contraceptive services using one of the following methods--

(i) Provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries; or

(ii) Arrange for an issuer or other entity to provide payments for contraceptive services for plan participants and beneficiaries without imposing any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or imposing a premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries.

(3) If a third party administrator provides or arranges payments for contraceptive services in accordance with either paragraph (b)(2)(i) or (ii) of this section, the costs of providing or arranging such payments may be reimbursed through an adjustment to the Federally

facilitated Exchange user fee for a participating issuer pursuant to 45 CFR156.50(d).

(4) A third party administrator may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (a)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self- certification described in paragraph (a)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which

the issuer would otherwise provide contraceptive coverage under § 2590.715–2713(a)(1)(iv) must—

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act, as incorporated into section 715 of ERISA. If the group health plan of the eligible organization provides coverage for some but not all of any contraceptive services required to be covered under § 2590.715–2713(a)(1)(iv), the issuer is required to provide payments only for those

contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services--self- insured and insured group health plans. For each plan year to which the accommodation in paragraph (b) or (c) of this section is to apply, a third party administrator required to provide or arrange payments for contraceptive services pursuant to paragraph (b) of this section, and an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section, must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the third party administrator or issuer, as applicable, provides separate payments for contraceptive services, and must provide contact information for questions and complaints. The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your employer has certified that your group health plan qualifies for an accommodation with respect to the federal requirement to cover all Food and Drug Administration-approved contraceptive services for

women, as prescribed by a health care provider, without cost sharing. This means that your employer will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of third party administrator/health insurance issuer] will provide or arrange separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your group health plan. Your employer will not administer or fund these payments. If you have any questions about this notice, contact [contact information for third party administrator/health insurance issuer]."

(e) Reliance--insured group health plans--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 2590.715–2713(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the issuer complies with the obligations under this section applicable to such issuer.

45 C.F.R. § 147.131

(a) Religious employers. In issuing guidelines under § 147.130(a)(1)(iv), the Health Resources and Services Administration may establish an exemption from such guidelines with respect to a group health plan established or maintained by a religious employer (and health insurance coverage provided in connection with a group health plan established or maintained by a religious employer) with respect to any requirement to cover contraceptive services under such guidelines. For purposes of this paragraph (a), a "religious employer" is an organization that is organized and operates as a nonprofit entity and is referred to in section 6033(a)(3)(A)(i, or (iii) of the Internal Revenue Code of 1986, as amended.

(b) Eligible organizations. An eligible organization is an organization that satisfies all of the following requirements:

(1) The organization opposes providing coverage for some or all of any contraceptive services required to be covered under § 147.130(a)(1)(iv) on account of religious objections.

(2) The organization is organized and operates as a nonprofit entity.

(3) The organization holds itself out as a religious organization.

(4) The organization self-certifies, in a form and manner specified by the Secretary, that it

satisfies the criteria in paragraphs (b)(1) through (3) of this section, and makes such self-certification available for examination upon request by the first day of the first plan year to which the accommodation in paragraph (c) of this section applies. The self- certification must be executed by a person authorized to make the certification on behalf of the organization, and must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974.

(c) Contraceptive coverage--insured group health plans--

(1) General rule. A group health plan established or maintained by an eligible organization that provides benefits through one or more group health insurance issuers complies for one or more plan years with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the eligible organization or group health plan furnishes a copy of the self-certification described in paragraph (b)(4) of this section to each issuer that would otherwise provide such coverage in connection with the group health plan. An issuer may not require any documentation other than the copy of the self-certification from the eligible organization regarding its status as such.

(2) Payments for contraceptive services--

(i) A group health insurance issuer that receives a copy of the self- certification described in paragraph (b)(4) of this section with respect to a group health plan established or maintained by an eligible organization in connection with which the issuer would otherwise provide contraceptive coverage under § 147.130(a)(1)(iv) must--

(A) Expressly exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan; and

(B) Provide separate payments for any contraceptive services required to be covered under § 147.130(a)(1)(iv) for plan participants and beneficiaries for so long as they remain enrolled in the plan.

(ii) With respect to payments for contraceptive services, the issuer may not impose any cost-sharing requirements (such as a copayment, coinsurance, or a deductible), or impose any premium, fee, or other charge, or any portion thereof, directly or indirectly, on the eligible organization, the group health plan, or plan participants or beneficiaries. The issuer must segregate premium revenue collected from the eligible organization from the monies used to provide payments for contraceptive services. The issuer must provide payments for contraceptive services in a manner that is consistent with the requirements under sections 2706, 2709, 2711, 2713, 2719, and 2719A of the PHS Act. If the group health plan of the eligible organization

provides coverage for some but not all of any contraceptive services required to be covered under § 147.130(a)(1)(iv), the issuer is required to provide payments only for those contraceptive services for which the group health plan does not provide coverage. However, the issuer may provide payments for all contraceptive services, at the issuer's option.

(d) Notice of availability of separate payments for contraceptive services-- insured group health plans and student health insurance coverage. For each plan year to which the accommodation in paragraph (c) of this section is to apply, an issuer required to provide payments for contraceptive services pursuant to paragraph (c) of this section must provide to plan participants and beneficiaries written notice of the availability of separate payments for contraceptive services contemporaneous with (to the extent possible), but separate from, any application materials distributed in connection with enrollment (or re-enrollment) in group health coverage that is effective beginning on the first day of each applicable plan year. The notice must specify that the eligible organization does not administer or fund contraceptive benefits, but that the issuer provides separate payments for contraceptive services, and must provide contact information for questions and complaints.The following model language, or substantially similar language, may be used to satisfy the notice requirement of this paragraph (d): "Your [employer/institution of higher education] has certified that your [group health plan/student health insurance coverage] qualifies for an accommodation

with respect to the federal requirement to cover all Food and Drug Administration- approved contraceptive services for women, as prescribed by a health care provider, without cost sharing. This means that your [employer/institution of higher education] will not contract, arrange, pay, or refer for contraceptive coverage. Instead, [name of health insurance issuer] will provide separate payments for contraceptive services that you use, without cost sharing and at no other cost, for so long as you are enrolled in your [group health plan/student health insurance coverage]. Your [employer/institution of higher education] will not administer or fund these payments. If you have any questions about this notice, contact [contact information for health insurance issuer]."

(e) Reliance--

(1) If an issuer relies reasonably and in good faith on a representation by the eligible organization as to its eligibility for the accommodation in paragraph (c) of this section, and the representation is later determined to be incorrect, the issuer is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the issuer complies with the obligations under this section applicable to such issuer.

(2) A group health plan is considered to comply with any requirement under § 147.130(a)(1)(iv) to provide contraceptive coverage if the plan complies with its obligations under paragraph (c) of this section, without regard to whether the

issuer complies with the obligations under this section applicable to such issuer.

(f) Application to student health insurance coverage. The provisions of this section apply to student health insurance coverage arranged by an eligible organization that is an institution of higher education in a manner comparable to that in which they apply to group health insurance coverage provided in connection with a group health plan established or maintained by an eligible organization that is an employer. In applying this section in the case of student health insurance coverage, a reference to "plan participants and beneficiaries" is a reference to student enrollees and their covered dependents.

EBSA FORM 700—CERTIFICATION
(revised August 2014)

This form may be used to certify that the health coverage established or maintained or arranged by the organization listed below qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing, pursuant to 26 CFR 54.9815-2713A, 29 CFR 2590.715-2713A, and 45 CFR 147.131. Alternatively, an eligible organization may also provide notice to the Secretary of Health and Human Services.

Please fill out this form completely. This form should be made available for examination upon request and maintained on file for at least 6 years following the end of the last applicable plan year.

Name of the objecting organization	
Name and title of the individual who is authorized to make, and makes, this certification on behalf of the organization	
Mailing and email addresses and phone number for the individual listed above	
I certify the organization is an eligible organization (as described in 26 CFR 54.9815-2713A(a), 29 CFR 2590.715-2713A(a); 45 CFR	

147.131(a)) and/or an eligible organization (as defined in 26 CFR 54.9815-2713A(a); 29 CFR 2590.715-2713A(a); 45 CFR 147.131(b)), and that is part of the same controlled group of corporations as, or under common control with, such employer and/or organization (within the meaning of section 52(a) or (b) of the Internal Revenue Code), is considered to meet the requirements of 26 CFR 54.9815-2713A(a)(3), 29 CFR 2590.715-2713A(a)(3), and 45 CFR 147.131(b)(3).

I declare that I have made this certification, and that, to the best of my knowledge and belief, it is true and correct. I also declare that this certification is complete.

_____

Signature of the individual listed above

_____

Date

The organization or its plan using this form must provide a copy of this certification to the plan's health insurance issuer (for insured health plans) or a third party administrator (for self-insured health plans) in order for the plan to be accommodated with respect to the contraceptive coverage requirement.

Notice to Third Party Administrators of Self-Insured Health Plans

In the case of a group health plan that provides benefits on a self-insured basis, the provision of this certification to a third party administrator for the plan that will process claims for contraceptive coverage required under 26 CFR 54.9815-2713(a)(1)(iv) or 29 CFR 2590.715-2713(a)(1)(iv) constitutes notice to the third party administrator that the eligible organization:

(1) Will not act as the plan administrator or claims administrator with respect to claims for contraceptive services, or contribute to the funding of contraceptive services; and

(2) The obligations of the third party administrator are set forth in 26 CFR 54.9815-2713A, 29 CFR 2510.3-16, and 29 CFR 2590.715-2713A.

As an alternative to using this form, an eligible organization may provide notice to the Secretary of Health and Human Services that the eligible organization has a religious objection to providing coverage for all or a subset of contraceptive services, pursuant to 26 CFR 54.9815-2713A(b)(1)(ii)(B) and (c)(1)(ii), 29 CFR 2590.715-2713A(b)(1)(ii)(B) and (c)(1)(ii), and 45 CFR 147.131(c)(1)(ii). A model notice is available at: http://www.cms.gov/cciio/resources/Regulations-and-Guidance/index.html#Prevention.

This form or a notice to the Secretary is an instrument under which the plan is operated.

PRA Disclosure Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1210-0150. An organization that seeks to be recognized as an eligible organization that qualifies for an accommodation with respect to the federal requirement to cover certain contraceptive services without cost sharing may complete this self-certification form, or provide notice to the Secretary of Health and Human Services, in order to obtain or retain the benefit of the exemption from covering certain contraceptive services. The self-certification form or notice to the Secretary of Health and Human Services must be maintained in a manner consistent with the record retention requirements under section 107 of the Employee Retirement Income Security Act of 1974, which generally requires records to be retained for six years. The time required to complete this information collection is estimated to average 50 minutes per response, including the time to review instructions, gather the necessary data, and complete and review the information collection. If you have comments concerning the accuracy of the time estimate(s) or suggestions for improving this form, please write to: U.S. Department of Labor, Employee Benefits Security Administration, Office of Policy and Research, 200 Constitution Avenue, N.W., Room N-5718, Washington, DC 20210 or email ebsa.opr@dol.gov and reference the OMB Control Number 1210-0150.